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What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians

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NOTES

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I. INTRODUCTION

As they say in the music business, "It all begins with a song."¹ This is true from a commercial perspective, as it would be difficult to record albums, film videos, license music for video games, sell sheet music, or promote concerts without the basic building block of the musical composition.² It is also true on the metaphysical level, because the organization of sounds into compositional form creates the necessary order that distinguishes music from noise.³

Yet despite the centrality of the song, for legal purposes it is difficult to answer the question, "What is a song?" Or, to use a less colloquial term, "What is a musical work?"⁴ There is no definition of "musical work" in the Copyright Act.⁵ Black's Law Dictionary is similarly unavailing.⁶ Not surprisingly, judicial interpretations of the term have been inconsistent.⁷ Thus, when listening to a recorded song, it is hard to know which aural sensations are protected by the composition's copyright and which are not.⁸

The original lyrics and vocal melody, to the extent they satisfy the requisite level of creativity, are generally protected as part of the musical composition.⁹ However, the degree of protection afforded

1. This is the motto of the Nashville Songwriters Association International ("NSAI"), which is the "largest not-for-profit member trade association for songwriters in the world." Barton Herbison, Message from the Executive Director of the NSAI, <http://www.nashvillesongwriters.com> (last visited Mar. 10, 2008).

2. See generally DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS (5th ed. 2003) (discussing various music industry activities that generate revenue).

3. John Blacking, *On Musical Behaviour*, in MUSIC, CULTURE, AND SOCIETY: A READER 97, 97-99 (Derek B. Scott ed., 2000).

4. See 17 U.S.C. § 102(a)(2) (2000) (naming "musical works, including any accompanying words," as among the general subject matter of federal copyright). The terms "musical composition" and "musical work" are used interchangeably herein.

5. See *id.* § 101 (defining terms of the statute without defining a "musical work").

6. See generally BLACK'S LAW DICTIONARY (8th ed. 2004) (lacking a definition for "musical work"). Nor does Black's contain a definition for "musical composition" or "song." *Id.*

7. Compare, e.g., *Tisi v. Patrick*, 97 F. Supp. 2d 539, 548-49 (S.D.N.Y. 2000) (assuming that only melody and lyrics are protectable as part of the musical work), with *ZZ Top v. Chrysler Corp.*, 54 F. Supp. 2d 983, 985 (W.D. Wash. 1999) (holding that a guitar riff and improvised guitar solo were copyrightable contributions to the musical composition).

8. This is not merely a theoretical concern. See, e.g., *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002) (stating that one issue in the case centered on "what is protected by [the plaintiffs'] copyright over the musical composition, as opposed to [a third party's] copyright over the sound recording").

9. See 17 U.S.C. § 102 (providing copyright protection for musical works and accompanying words); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-46 (1991) (articulating a very low standard for the sufficient level of creativity for copyright protection, a "minimal degree of creativity"); see also *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (using the "minimal" creativity standard); 1 MELVILLE B. NIMMER & DAVID NIMMER,

unique instrumental figures (i.e., “riffs”¹⁰) played by session musicians or band members is less clear. Record producers often create or influence the instrumental parts played by recording artists, and they implement sound manipulation techniques in the recording studio that give a recorded composition its unique character.¹¹ Are the producer’s contributions part of the musical composition?¹²

Many judges believe that, for purposes of copyright protection, a “musical work” is comprised primarily of melody and lyrics.¹³ This belief probably stems from the 1909 Copyright Act requirement that musical works be documented in written notation and filed with the Copyright Office to obtain copyright protection. However, that requirement was not included in the 1976 Copyright Act.¹⁴ The problem with this judicial belief is that the “melody and lyrics” conception of musical works is archaic when applied to contemporary popular music.¹⁵ In popular music, sound manipulation is often as

NIMMER ON COPYRIGHT § 2.01[B] (2007) (addressing various phrasings of a similarly low standard for sufficient creativity); 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:93 (2007) (discussing the requisite level of originality for musical works).

10. See *Jarvis v. A & M Records*, 827 F. Supp. 282, 291 (D.N.J. 1993) (defining keyboard “riff” as a “musical phrase”); see also *Ulloa v. Universal Music & Video Distrib. Group*, 303 F. Supp. 2d 409, 411 n.1 (S.D.N.Y. 2004) (discussing an “instrumental riff” which “consisted of ten notes performed by a stringed instrument or synthesizer keyboard, which was created by the producer of the . . . song”). The *Ulloa* case also discusses a vocal phrase sung by the plaintiff as a counter melody to the song’s primary melody, which was the subject of the plaintiff’s joint authorship and copyright infringement claims. *Id.* at 411-13.

11. See generally VIRGIL MOOREFIELD, THE PRODUCER AS COMPOSER: SHAPING THE SOUNDS OF POPULAR MUSIC (2005) (discussing the historical development of the independent record producer as an artist who makes musical contributions distinct from those of the performers).

12. Others have noted this uncertainty, as well. See M. WILLIAM KRASILOVSKY & SIDNEY SHEMELE, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 38 (8th ed. 2000) (“By the mid-1990s, the independent record producer often assumed the role of arranger as well. . . . Whether the producer-arranger should be listed as coauthor of the music is unclear under these circumstances, and a potential source of copyright confusion.”).

13. See, e.g., *Tisi v. Patrick*, 97 F. Supp. 2d 539, 548-49 (S.D.N.Y. 2000) (granting summary judgment for defendants because plaintiff could not “contend that either the lyrics or the melody of [the two compositions were] strikingly similar,” and holding that key, tempo, chord progression, chord selection, and guitar rhythm are not copyrightable as a matter of law); *Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 282 (S.D.N.Y. 1991) (finding song structure, chord progression, and “recurring eighth note rhythm” to be “ordinary, unprotectable expression”); *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (“It is in the melody of the composition[] or the arrangement of notes or tones that originality must be found.”); see also Jason Toynbee, *Musicians*, in MUSIC AND COPYRIGHT 123, 125 (Simon Frith & Lee Marshall eds., 2d ed. 2004) (arguing that judges implicitly reduce musical works to melody and lyrics for ease of judicial administration).

14. See *infra* Part IV (discussing statutory ambiguity and the history of the written notation requirement).

15. This Note uses the term “popular” music to refer to works in such musical genres as rock, pop, folk, R&B, hip-hop, country, electronica, Latin, and jazz, and to distinguish such works from works of “classical” music. See SIMON FRITH, PERFORMING RITES: ON THE VALUE OF

important as melody for establishing the originality of a composition.¹⁶ Furthermore, a restrictive view of musical works ignores the collaborative process through which much popular music is composed today. Musicians often compose in the studio while recording. In those situations, the sound recording is the first fixation of the composition and the definitive guide as to what constitutes the "musical work."¹⁷ Accordingly, it is more difficult to parse the distinct musical composition and sound recording copyrights than is often suggested.¹⁸

One commentator summarized the changes in record production and music composition over the past fifty years as follows:

Originally, the aim of recordings was to create the illusion of a concert hall setting. The idea was to bring to the living room the sensation of being at a live performance . . .

Rock and the many subgenres it has spawned are a different story: timbre and rhythm are arguably the most important aspects of this music. Generally, nothing beyond a lyric sheet and possibly a few chord changes is written down; the recording of a song functions as its score, its definitive version. . . . For rock and pop, the interest generally lies not in virtuosity or harmonic complexity, but in a mood, an atmosphere, an unusual combination of sounds . . .¹⁹

Unfortunately, copyright law has not adapted to these changes in compositional norms.²⁰ Thus, copyright law does not consistently protect the many artists that contribute to the creation of musical compositions.

This Note analyzes the scope of the musical work copyright in light of current popular music composition and production practices to reveal copyright's fundamentally unfair treatment of record producers

POPULAR MUSIC 75-95 (1996) (discussing genre labeling practices within the music industry); Allan F. Moore, *On the Pop-Classical Split*, in MUSIC, CULTURE, AND SOCIETY: A READER, *supra* note 3, at 161, 161-63 (discussing the distinction between "popular" and "classical" music).

16. See David Brackett, *Music*, in KEY TERMS IN POPULAR MUSIC AND CULTURE 124, 126 (Bruce Horner & Thomas Swiss eds., 1999) ("[T]he elements emphasized by notation and score study exclude precisely those elements . . . that have figured so importantly in much recent popular music."); Paul Théberge, *Technology, Creative Practice and Copyright*, in MUSIC AND COPYRIGHT, *supra* note 13, at 139, 141-44 ("[I]t is the *sound* of music that is the focal point of the technologist's aesthetic concerns and the musical feature that consumers most readily recognise.").

17. See Théberge, *supra* note 16, at 143 ("Finally, as the recording studio became the primary site in which the creation of popular music takes place, it displaced the musical score as a means of musical composition."); Toynbee, *supra* note 13, at 126-28 (describing this practice as "phonographic orality").

18. See 17 U.S.C. § 102(a)(2), (7) (2000) (providing for distinct copyrights); *Jarvis v. A & M Records*, 827 F. Supp. 282, 292 (D.N.J. 1993) ("Under the Copyright Act, there is a *well-established* distinction between sound recordings and musical compositions." (emphasis added)).

19. MOOREFIELD, *supra* note 11, at xiv-xv.

20. See *infra* notes 89-95 and accompanying text (regarding judicial misunderstanding of modern popular music composition norms and an implicit retention of the written notation requirement).

and side musicians. For ease of reference, this Note refers collectively to those record producers and side musicians who are not credited as authors of the musical composition as "secondary contributors." This designation distinguishes them from those authors who explicitly receive musical composition authorship credit, who are referred to as "primary contributors."²¹ The term "side musician" refers to any musician who performs on the recorded version of a musical composition but is not credited as a composer of such composition. This designation encompasses both session musicians, who are paid a fee to perform on the recording but have no formal affiliation with the performer featured on the recording,²² and members of a band who are not credited as composers of a composition recorded by that group.²³ This Note focuses on the treatment of secondary contributors. Their work, while significant in the artistic sense and relied on by primary contributors to prove infringement, is often judged insufficient to garner legal authorship credit in the musical composition.

This Note argues that current copyright jurisprudence allows primary contributors to free ride on the contributions of secondary contributors by subsuming the contributions of the latter to the recorded version of the composition into the copyright of the composition itself. Specifically, courts more narrowly construe the scope of musical works when secondary contributors bring claims for joint authorship against primary contributors than when primary contributors claim copyright infringement by third parties. Because this inconsistency has not been examined in detail, if it has been discussed at all, primary contributors have been able to expand the scope of their protectable expression through the creative efforts of secondary contributors without necessarily compensating such secondary contributors for this broadened monopoly.

Part II of this Note provides a background on relevant copyright law principles. Part III discusses contemporary industry practices in music composition, production, and recording, including the respective roles of record producers and side musicians, to

21. Note that, in some instances, record producers or side musicians may be credited explicitly as composers due to some combination of the significance of their contributions to the composition and the significance of their bargaining power relative to the other composers. See M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, *THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 19-40* (10th ed. 2000) (regarding record producers). In these circumstances, such record producers and side musicians would be deemed primary contributors.

22. KEITH NEGUS, *PRODUCING POP: CULTURE AND CONFLICT IN THE POPULAR MUSIC INDUSTRY* 85 (1992).

23. See, e.g., *BTE v. Bonnezaze*, 43 F. Supp. 2d 619, 621 (E.D. La. 1999) (outlining suit brought by a former drummer of the rock band Better Than Ezra who claimed joint authorship of musical compositions purportedly authored solely by the band's lead singer).

explicate the collaborative nature of contemporary music composition. With these industry practices in mind, Part IV examines the current ambiguity surrounding the scope of the musical work copyright, which has resulted from the absence of a statutory definition and the elimination of any requirement that musical compositions be reduced to written notation to obtain copyright protection.²⁴ Part V addresses courts' disparate treatment of musical works in joint authorship and copyright infringement cases and argues that this inconsistent treatment short-changes secondary contributors while unfairly enriching primary contributors. Finally, Part VI argues for both the adoption of a "musical work" definition that includes all non *de minimis* contributions of expression made by secondary contributors and the wider adoption of the Nimmer Rule for joint authorship claims, so that contributions need not be independently copyrightable for secondary contributors to obtain joint authorship. These changes would ensure that record producers and side musicians are more fairly recognized and compensated for their work.

II. LEGAL BACKGROUND

The Copyright Act protects "original works of authorship fixed in any tangible medium of expression."²⁵ The Act specifically protects two distinct copyrights evident in the recorded version of a musical composition: the copyright in the underlying musical work²⁶ and the copyright in the sound recording of the specific performance of the work.²⁷ While this Note deals primarily with the contours of the musical work copyright, an understanding of how the musical work copyright interacts with the sound recording copyright is crucial. This

24. Under the 1909 Copyright Act, a musical work had to be reduced to sheet music or other written form in order to claim a copyright. Pub. L. No. 60-349, 35 Stat. 1075 (codified originally at 17 U.S.C. § 10 (1909) (repealed by Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976)) (requiring the placement of copyright notice of all copies of a musical work); *id.* §§ 12-13 (requiring the deposit of copies of a musical work); *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 15-17 (1908); *see also* 1 NIMMER & NIMMER, *supra* note 9, § 2.05[A] & nn.9-12 (regarding the incorporation of the *White-Smith Music* doctrine into the 1909 Copyright Act). This requirement was eliminated under the Copyright Act of 1976. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 102(a) (2000)) (providing that "fixation" of a musical work may now be made through "any tangible medium of expression . . . from which [such work] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" (emphasis added)); *see also* 1 NIMMER & NIMMER, *supra* note 9, § 2.05[A] & nn.2-7 (discussing the fixation of musical compositions through studio recording).

25. 17 U.S.C. § 102(a). This Note will refer to the Copyright Act of 1976, as amended, as either "the Copyright Act" or "the Act."

26. *Id.* § 102(a)(2).

27. *Id.* § 102(a)(7).

Part first describes the nature of these two independent yet related copyrights. Next, it provides some legal background on both copyright infringement and joint authorship doctrines.

A. Distinct Copyrights for Musical Compositions and Sound Recordings

The Copyright Act includes “musical works, including any accompanying words” as copyrightable subject matter.²⁸ The term “musical works” is not defined in the Act; legislative history indicates that Congress believed it had a “fairly settled meaning[.]”²⁹ Unfortunately, the legislative history provides no further elaboration,³⁰ and courts have adopted varying interpretations. Some courts adhere to the simplistic notion that a musical composition is merely “melody and lyrics.”³¹ Other courts take a slightly broader view, including rhythm and harmony in addition to melody and lyrics.³² However, as discussed below, both of these definitions are underinclusive given the realities of contemporary popular music production and composition.³³

As a third approach, one court has said that “a musical composition’s copyright protects the generic sound that would necessarily result from any performance of the piece.”³⁴ This definition encapsulates the *theory* of the musical work copyright and its distinction from the sound recording copyright. However, it still does not indicate which sonic elements expressed in the recording are included within the musical composition. The logic of this putative definition is circuitous, because it merely begs the question: Which sounds would result from *any* performance and which are unique to the specific performance captured by the sound recording? This court’s attempt at a definition does little to answer that more fundamental question.

28. *Id.* § 102(a)(2).

29. H.R. REP. NO. 94-1476, at 53 (1976); 1 NIMMER & NIMMER, *supra* note 9, § 2.05.

30. See H.R. REP. NO. 94-1476, at 53 (“There is no need, for example, to specify the copyrightability of electronic or concrete music in the statute . . .”).

31. See *supra* note 13 and accompanying text.

32. See, e.g., *Bridgeport Music, Inc. v. Still N The Water Publ’g*, 327 F.3d 472, 475 n.3 (6th Cir. 2003) (identifying rhythm, harmony, and melody as elements of composition); see also 1 NIMMER & NIMMER, *supra* note 9, § 2.05[D] (noting examples of courts recognizing rhythm and harmony as elements of originality).

33. See *infra* Part V.

34. *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002), *aff’d on other grounds*, 388 F.3d 1189 (9th Cir. 2004).

Distinct from the musical composition copyright is the copyright in the sound recording—i.e., the captured, original performance of the musical composition.³⁵ The Act defines “sound recordings” as “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work”³⁶ In the context of a recorded musical work, “the sound recording is the sound produced by the performer’s rendition of the musical work.”³⁷ Thus, the embellishments, improvisations, and other idiosyncrasies unique to a specific recorded performance are protected under the sound recording copyright, notwithstanding that they may not be covered by the musical composition copyright.³⁸

These two copyrights are frequently confused by both laypersons and lawyers.³⁹ Although maintaining the distinction is vital for both doctrinal and practical reasons,⁴⁰ the confusion is understandable. Given the practice of using the recording studio as a compositional medium⁴¹ and in light of the elimination of a written notation requirement,⁴² the boundary separating these two copyrights has become blurred.

B. Copyright Infringement

At the heart of copyright protection lies the copyright owner’s ability to protect his intellectual property through an infringement action.⁴³ The elements of a copyright infringement action are “(1)

35. 17 U.S.C. § 102(a)(7) (2000). See generally 1 NIMMER & NIMMER, *supra* note 9, § 2.10 (discussing sound recordings); 1 PATRY, *supra* note 9, § 3:160 (same).

36. 17 U.S.C. § 101.

37. *Newton*, 204 F. Supp. 2d at 1249-50.

38. See 1 NIMMER & NIMMER, *supra* note 9, § 2.10[A][2][a] (regarding requirement for performers’ originality in sound recordings).

39. See, e.g., *Newton*, 204 F. Supp. 2d at 1250 (chastising plaintiff for “largely ignor[ing] the distinction between musical compositions and sound recordings”).

40. In addition to the need to separate the sound recording copyright from the musical composition copyright in legally analyzing a claim for copyright infringement, see, e.g., *id.*, as a practical matter, these copyrights represent two distinct sources of potential licensing revenue for a performer/composer. See PASSMAN, *supra* note 2, at 61-173, 193-244 (discussing potential revenue sources stemming from exploitation of the sound recording and composition, respectively); 1 PATRY, *supra* note 9, § 3:160 (“This distinction between the musical composition copyright and the sound recording copyright is significant . . . for licensing, since the musical composition copyright is typically owned by a musical publisher, while the sound recording copyright is typically owned by a record company.”).

41. See discussion *infra* Part III (on contemporary music composition practices).

42. See *infra* Part IV.

43. See Lee Marshall, *Infringers*, in MUSIC AND COPYRIGHT, *supra* note 13, at 189 (discussing various forms of infringement).

ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”⁴⁴ Discussion of the first element is not relevant to this Note. As for the second element, there are two primary methods of analysis applicable to musical works.

In *Arnstein v. Porter*, the Second Circuit laid out two prongs of “copying” that must be proven in an infringement action: copying as a *factual matter*, and copying as a *legal proposition*.⁴⁵ The first prong, copying in fact, is demonstrated either by direct evidence of copying⁴⁶ or by the dual showing of access to the plaintiff’s copyrighted work and substantial similarity of the defendant’s work to copyrightable elements in the plaintiff’s work, known as “probative similarity.”⁴⁷ To establish probative similarity, the plaintiff must show “substantial similarity between the works when compared in their entirety including both protectable and unprotectable material.”⁴⁸ Dissection of the musical composition into its constituent parts is relevant to the court’s determination of probative similarity.⁴⁹ As discussed *infra*,⁵⁰ it is during this dissection to determine probative similarity that a

44. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *see also* 4 NIMMER & NIMMER, *supra* note 9, § 13.01 (regarding the necessary elements that a plaintiff must prove in an infringement action).

45. 154 F.2d 464, 468-69, 472-73 (2d Cir. 1946) (requiring a showing that “(a) defendant copied from plaintiff’s copyrighted work and (b) that the copying . . . constitute[d] improper appropriation”); *see also* *Hoehling v. Universal City Studios*, 618 F.2d 972, 977 (2d Cir. 1980) (positively citing *Arnstein*).

46. For cases relying on direct evidence of copying, either proved by plaintiff or conceded by defendant, *see, e.g.*, *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992); *Marshall & Swift v. BS & A Software*, 871 F. Supp. 952, 959 (W.D. Mich. 1994); *Broderbund Software, Inc. v. Unison World, Inc.*, 648 F. Supp. 1127, 1135 (N.D. Cal. 1986).

47. For cases discussing the dual requirements of access and substantial similarity, *see, e.g.*, *Langman Fabrics v. Graff Californiawear, Inc.*, 160 F.3d 106, 115 (2d Cir. 1998); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1072 (2d Cir. 1992); *Ferguson v. Nat’l Broad. Co.*, 584 F.2d 111, 113 (5th Cir. 1978). Note that while the previously cited cases use the term “substantial similarity,” the more accurate and prevailing practice is to use the term “probative similarity” to identify this element. *See* Alan Latman, “*Probative Similarity*” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1204-14 (proposing substituting “probative similarity” for this usage of the term “substantial similarity”); *see also* *Ringgold v. Black Entm’t Tel.*, 126 F.3d 70, 74-75 (2d Cir. 1997) (complementing Professor Latman’s use of “probative similarity”); *McDonald v. Multimedia Entm’t, Inc.*, No. 90 Civ. 6356, 1991 WL 311921, at *2-3 (S.D.N.Y. 1991) (using the term “probative similarity”); 4 NIMMER & NIMMER, *supra* note 9, § 13.01[B] & n.31.1 (adopting this use of “probative similarity”).

48. *Stillman v. Leo Burnett Co.*, 720 F. Supp. 1353, 1358 (N.D. Ill. 1989) (citations omitted); 4 NIMMER & NIMMER, *supra* note 9, § 13.01 n.26.3.

49. *Arnstein*, 154 F.2d at 468; *see also* *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 608-09 (1st Cir. 1988) (comparing concrete lawn statues); *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1232 (3d Cir. 1986) (comparing computer source code).

50. *See infra* Part V.B.

primary contributor plaintiff explicitly introduces contributions to the musical work by record producers and side musicians.⁵¹

Arnstein's second prong addresses copying as a legal proposition, known as "improper appropriation."⁵² The inquiry is whether "the defendant's copying extended to the plaintiff's protectable expression."⁵³ If a defendant appropriates merely non-copyrightable elements of the plaintiff's work, no improper appropriation exists and the infringement claim fails.⁵⁴ To test for improper appropriation, courts rely on the response of the "ordinary lay listener" rather than the categorization of elements of the work as copyrightable or non-copyrightable by expert witness testimony.⁵⁵ Under *Arnstein's* formulation, "[t]he question . . . is whether defendant took from plaintiff's work so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."⁵⁶ Under this prong, dissection of the musical work is not appropriate.⁵⁷ It is doubtful, however, that juries adhere to this prohibition on the use of musical dissection evidence in reaching their decisions.⁵⁸ As a result, the work of secondary contributors probably enters the infringement determination under this prong as well.

51. See, e.g., *Swirsky v. Carey*, 226 F. Supp. 2d 1224, 1227-30 (C.D. Cal. 2002) (analyzing contrasting transcriptions of bass guitar parts as relevant to probative similarity), *rev'd on other grounds*, 376 F.3d 841 (9th Cir. 2004).

52. *Arnstein*, 154 F.2d at 472-73. Note that "improper appropriation" is also often referred to as "substantial similarity." *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 813 (1st Cir. 1995); *Eng'g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1341 (5th Cir. 1994); *Hoehling v. Universal City Studios*, 618 F.2d 972, 977 (2d Cir. 1980). See generally 4 NIMMER & NIMMER, *supra* note 9, §13.03 (discussing substantial similarity element).

53. *Stillman*, 720 F. Supp. at 1358 (emphasis added); 4 NIMMER & NIMMER, *supra* note 9, §13.01[B] n.26.3.

54. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361-62 (1991) (finding for defendant where, despite established copying, the elements taken from plaintiff's work were unoriginal and thus non-copyrightable as a matter of law); *Arnstein*, 154 F.2d at 472-73 ("Assuming that adequate proof is made of copying, that is not enough; for there can be 'permissible copying,' copying which is not illicit." (citation omitted)).

55. See *Arnstein*, 154 F.2d at 468, 473 (alternating between the words "hearer" and "listener"); see also *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 733-34 (4th Cir. 1990) (using the phrase "reaction" of the "lay listener"); *Repp v. Webber*, 892 F. Supp. 552, 557 (S.D.N.Y. 1995) (quoting *Arnstein*).

56. *Arnstein*, 154 F.2d at 473; see also *Repp*, 892 F. Supp. at 557 (quoting *Arnstein*).

57. *Arnstein*, 154 F.2d at 468, 472-73; see also *Concrete Machinery Co., Inc. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 608 (1st Cir. 1988) (following *Arnstein*); *Tienshan, Inc. v. C.C.A. Int'l (N.J.), Inc.*, 895 F. Supp. 651, 658 (S.D.N.Y. 1995) (same).

58. See *infra* notes 202-12 and accompanying text (regarding the implicit incorporation of secondary contributor contributions into the jury's substantial similarity determination).

The analysis described above is not the only way to subdivide the dual elements of ownership and copying necessary for a successful copyright infringement action.⁵⁹ As an alternative to the *Arnstein* test, the Ninth Circuit promulgated its own framework in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*⁶⁰ Under *Krofft*, plaintiffs show copying through “circumstantial evidence of access to the copyrighted work and substantial similarity between the copyrighted work and defendant’s work.”⁶¹ This test further divides “substantial similarity” into two analytic steps: (1) the “extrinsic test,” which asks “whether there is substantial similarity in *ideas*,” and (2) the “intrinsic test,” which asks “whether there is substantial similarity in *the expressions* of the ideas.”⁶² The second step is only applied if the plaintiff satisfies the first step.⁶³ Dissection of the musical work and expert testimony are only permitted under the extrinsic test; the determination of substantial similarity under the “intrinsic test” is instead said to “depend[] on the response of the ordinary reasonable person.”⁶⁴

Despite the doctrinal nuances distinguishing the *Arnstein* and *Krofft* tests, many courts and commentators have asserted that they are fundamentally the same analysis.⁶⁵ Under either test, the court engages in: (1) an inquiry that employs expert testimony to dissect the musical composition into its constituent parts, considering both copyrightable and non-copyrightable elements of the composition;⁶⁶ and (2) an inquiry that purports to reject such expert testimony and

59. *Feist Publ'ns*, 499 U.S. at 361.

60. 562 F.2d 1157 (9th Cir. 1977).

61. *Id.* at 1162 (emphasis added).

62. *Id.* at 1164 (emphasis added); see also *Shaw v. Lindheim*, 919 F.2d 1353, 1358 (9th Cir. 1990) (applying and modifying the *Krofft* test); 4 NIMMER & NIMMER, *supra* note 9, §13.03[E][3][b][i] (discussing and criticizing the *Krofft* test).

63. *Krofft*, 562 F.2d at 1164.

64. *Id.*

65. See *id.* at 1165 n.7 (“We do not resurrect the *Arnstein* approach today. Rather, we formulate an extrinsic-intrinsic test for infringement based on the idea-expression dichotomy. We believe that the *Arnstein* court was doing nearly the same thing.”); see also *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1232 (3d Cir. 1986) (relating the steps of the *Arnstein* and *Krofft* tests); Alice J. Kim, Note, *Expert Testimony and Substantial Similarity: Facing the Music in (Music) Copyright Infringement Cases*, 19 COLUM. J.L. & ARTS 109, 120 (1995) (noting that both tests “share the fundamental flaw of proscribing expert testimony just where it is most needed”). See generally Michael Der Manuelian, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127 (1988) (addressing the flaws of both tests in regard to how they incorporate, or fail to incorporate, expert witness testimony).

66. This is the “probative similarity” aspect of the “copying as a factual matter” prong under the *Arnstein* test, 154 F.2d 464, 468-69 (2d Cir. 1946), and the “extrinsic test” prong of the *Krofft* test, 562 F.2d at 1164.

dissection in favor of a judgment by the jury as representative of an "ordinary lay audience."⁶⁷ Thus, under both the *Arnstein* and the *Krofft* tests there is a step in which the contributions of secondary contributors are introduced explicitly as probative evidence of infringement, followed by a step in which such contributions purportedly are disregarded (but, as noted before, may not be). In analyzing how courts' copyright infringement examinations unfairly treat record producers and side musicians,⁶⁸ this Note will examine cases employing both tests without differentiation unless especially relevant.⁶⁹ Both tests allow primary contributors to rely unfairly on the work of secondary contributors to help to prove infringement.

C. Joint Authorship

Ownership of a copyright "vests initially in the author or authors of the work."⁷⁰ The Supreme Court has said that, "[a]s a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection."⁷¹ Assuming no co-authors or secondary contributors, and no agreement to the contrary, the composer is the owner of a musical composition copyright, and the performer is the owner of a sound recording copyright.⁷²

67. This is the "improper appropriation" (i.e., "substantial similarity") prong of the *Arnstein* test, 154 F.2d at 472-73, and the "intrinsic test" prong of the *Krofft* test, 562 F.2d at 1164.

68. See *infra* Part V.

69. This is not to suggest that the world of copyright infringement analyses can be divided neatly into distinct *Arnstein* test or *Krofft* test camps. Over the years courts have blended, amended, and conflated these two approaches, sometimes deliberately and sometimes not, in addition to proposing alternate approaches entirely. See *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1295-96 (D.C. Cir. 2002) (adopting a two-step filtration-comparison test that filters out unprotectable ideas and generic expression from plaintiffs copyrighted work before comparing such work with the defendant's alleging infringing work); *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1284-85 (10th Cir. 1996) (applying the "abstraction-filtration-comparison" test on which *Sturdza* relies); *Shaw v. Lindheim*, 919 F.2d 1353, 1357 (9th Cir. 1990) (recasting the *Krofft* extrinsic-intrinsic analysis as "objective and subjective analyses of expression"); see also *Kohus v. Mariol*, 328 F.3d 848, 854-56 (6th Cir. 2003) (adopting the *Sturdza* / *Country Kids* test); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 707 (2d Cir. 1992) (adopting a special filtration analysis, on which *Sturdza* and *Country Kids* rely, for computer software infringement actions); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1475-76 (9th Cir. 1992) (like the later-developed filtration tests, using analytic dissection to determine the scope of plaintiff's copyright in the computer software context).

70. 17 U.S.C. § 201(a) (2000).

71. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989); see also *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884) ("An author . . . is he to whom anything owes its origin; originator; maker . . ." (internal quotation omitted)).

72. This assumption is highly theoretical. As a practical matter, copyright ownership is often explicitly transferred from an artist to a music publishing company, in the case of the

The Copyright Act provides that “authors of a joint work are coowners of copyright in the work.”⁷³ The Act defines a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”⁷⁴ Under this definition, a party must establish three elements to prove joint authorship: (1) intent of the authors to merge their respective contributions, (2) a contribution by each author, and (3) merger of the respective contributions into an inseparable or interdependent unitary whole.⁷⁵

The contours of the “intent” element remain somewhat ambiguous, and courts diverge in their interpretations. The salient ambiguity is whether a court should require intent by the putative joint authors *to work together* or, alternatively, *to become joint authors*.⁷⁶ The prevailing judicial trend is to require the latter.⁷⁷ By

musical composition, and to a record label, in the case of the sound recording, so that those entities become the copyright holders. KRASILOVSKY & SHEL, *supra* note 21, at 27, 64-65; DAVID J. MOSER, MUSIC COPYRIGHT FOR THE NEW MILLENNIUM 45-48, 51-53 (2002); PASSMAN, *supra* note 2, at 201-05. Furthermore, there are many parties (including side musicians, record producers, backing vocalists, and sound engineers) who potentially could claim authorship in the sound recording. *See generally* Mark H. Jaffe, *Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC'Y U.S.A. 139 (2006) (discussing many potential sound recording authorship claimants). A special ownership rule applies in the case of a “work made for hire,” where the employer is considered the “author” and holds all of the rights in the copyright. 17 U.S.C. § 201(b); *Reid*, 490 U.S. at 737.

73. 17 U.S.C. § 201(a).

74. *Id.* § 101. Professor Nimmer argues that this is more precisely characterized as a definition of joint *authorship*, since a joint work is created whenever “the copyright is owned in undivided shares by two or more persons.” 1 NIMMER & NIMMER, *supra* note 9, § 6.01; *accord Reid*, 490 U.S. at 753 (declaring the Act’s definition of “joint work” to be determinative of whether a party might be “joint author”).

75. *Clogston v. Am. Acad. of Orthopaedic Surgeons*, 930 F. Supp. 1156, 1159 (W.D. Tex. 1996) (citing *Childress v. Taylor*, 945 F.2d 500, 505-09 (2d Cir. 1991), and *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068-71 (7th Cir. 1994)); Jane G. Stevens & Gillian M. Lusins, *Joint Ownership Under the Copyright Act: Yours, Mine or Ours? A Survey of the Law*, C962 A.L.I.-A.B.A. 119, 127-28 (1994) (summarizing the elements of joint authorship).

76. *See Childress*, 945 F.2d at 507 (noting this statutory ambiguity).

77. *Id.* at 508-09; *see also* *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) (requiring that “putative coauthors make objective manifestations of a shared intent to be coauthors”); *Thomson v. Larson*, 147 F.3d 195, 201-02 (2d Cir. 1998) (examining and following *Childress*); *Erickson*, 13 F.3d at 1068-69 (adopting *Childress*); *Gilliam v. ABC, Inc.*, 538 F.2d 14, 22 (2d Cir. 1976) (stating that the written agreements at issue “suggest that the parties did not consider themselves joint authors of a single work” (emphasis added)). *But see* *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004) (holding that when two putative authors collaborate, “[t]heir intent to be the joint owners of the copyright in the article would be plain, and that should be enough to constitute them joint authors within the meaning of” the Copyright Act); 1 ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING, AND THE ARTS § 1:19 (3d ed. 2007) (“The Seventh Circuit’s interpretation of ‘joint work’ in *Gaiman v. McFarlane* is closest to the language in the Copyright Act itself. . . . The statute does not say ‘two or more parties who contribute independently copyrightable material who, in addition have the

contrast, the “merger” element is not subject to much uncertainty as applied to musical compositions. The House Report to the Copyright Act refers to “the words and music of a song” as an example of “interdependent parts of a unitary whole.”⁷⁸ Just as music and lyrics are part of an interdependent whole, so are various musical elements in a composition part of the same interdependent whole.⁷⁹

The second element of joint authorship—a contribution by each putative joint author—has engendered an even greater degree of judicial disagreement.⁸⁰ The primary issue is whether the individual contributions of each putative joint author must be independently copyrightable in order for each contributor to successfully claim joint authorship. The “Goldstein Rule,” named after the professor most widely known for its articulation,⁸¹ states that a party’s contribution to the work must be independently copyrightable for such party to obtain co-ownership of the work’s copyright.⁸² This view is the most widely held,⁸³ and it is significant for music industry purposes that it has been adopted by both the Second and Ninth Circuit Courts of Appeal.⁸⁴

intent to be joint owners of the work.’”). For a case finding against a secondary contributor joint authorship plaintiff based upon a lack of intent to become joint authors with the primary contributor, see *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 417-18 (S.D.N.Y. 2004) (denying joint authorship in the musical composition to a vocalist who extemporaneously performed a countermelody in the recording studio).

78. H.R. REP. NO. 94-1476, at 120 (1976).

79. See *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 645-46, *aff’d on other grounds*, 457 F.2d 1213 (2d Cir. 1972) (“The words and music of a song constitute a ‘musical composition’ in which the two contributions merge into a single work to be performed as a unit for the pleasure of the hearers; they are . . . as little separable for purposes of the copyright as are the individual musical notes which constitute the melody.” (quoting *Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co., Inc.*, 161 F.2d 406, 409 (2d Cir. 1946))).

80. See *Brown v. Flowers*, 196 Fed. App’x 178, 186-89 (4th Cir. 2006) (Gregory, J., dissenting) (discussing the “two competing interpretations” of this issue, one requiring independent copyrightability of each contributor’s contributions and the other not requiring such); 1 LINDEY & LANDAU, *supra* note 77, § 1:18 (on the subject of independent copyrightable contributions); Russ VerSteeg, *Defining “Author” for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1326-37 (1996) (survey of varying approaches). See generally Teresa Huang, Note, *Gaiman v. McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material*, 20 BERKELEY TECH. L.J. 673 (2005) (discussing recent developments).

81. PAUL GOLDSTEIN, 1 COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE § 4.2.1.2 (2d ed. Supp. 2004).

82. *Id.*

83. See 1 NIMMER & NIMMER, *supra* note 9, § 6.07[A][3][b] (conceding that the Goldstein Rule, while in conflict with the stance taken by the Nimmer treatise, is nevertheless the “prevailing view in the case law”).

84. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000) (holding that “[a] ‘joint work’ in [the Ninth] circuit ‘requires each author to make an independently copyrightable contribution’ to the disputed work,” and finding that a consultant on a Spike Lee-directed film was not entitled to joint authorship of the film (quoting *Ashton-Tate Corp. v. Ross*, 916 F.2d 516,

Other courts have adopted the “Nimmer Rule,” named for the professor who has been an outspoken advocate for its adoption.⁸⁵ Under the Nimmer Rule, the contributions of a putative joint author need not be independently copyrightable to be the basis of a successful joint authorship claim so long as each author makes more than a *de minimis* contribution to the work.⁸⁶ Under this more lenient approach, secondary contributors have a greater chance of prevailing on a joint authorship claim than under the Goldstein Rule. Courts dismissed the Nimmer Rule for years as purely theoretical and out of line with the prevailing judicial trend;⁸⁷ however, this approach has experienced a recent resurgence.⁸⁸ Nevertheless, it remains a minority approach

521 (9th Cir. 1990)); *Childress v. Taylor*, 945 F.2d 500, 506-07 (2d Cir. 1991) (adopting the requirement of an independently copyrightable contribution in the Second Circuit, and finding that an actress who contributed research and ideas to a playwright was not a co-author of the play); *PASSMAN*, *supra* note 2, at 16 (implicitly recognizing the preeminence of the Second and Ninth Circuits for music industry purposes by stating that “[t]he major players are almost all in Los Angeles and New York”); *see also* *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1493 (11th Cir. 1990) (implicitly adopting the Goldstein Rule in the Eleventh Circuit in the context of architectural plans).

85. 1 NIMMER & NIMMER, *supra* note 9, § 6.07[A][3]. Note that Professor Nimmer is not the only well-known commentator to take this stance. *See, e.g.*, 1 LINDEY & LANDAU, *supra* note 77, § 1:18 & nn.6-10 (“The fact that Congress did not accept the proposed amendments to [the definitions section of the Copyright Act], including the requirement of a copyrightable contribution, is further evidence that Congress did not intend to demand that each joint owner’s contribution meet the ‘originality’ standard.”); 2 PATRY, *supra* note 9, § 5:15 (arguing that *Childress v. Taylor*, the seminal Second Circuit case that serves as the foundation for the Goldstein Rule, “has been misunderstood by many courts as suggesting that each joint author must contribute not only expression, but also ‘independently copyrightable’ material”). Professor Patry and Professor Nimmer are not in total agreement on this issue, however, as Professor Patry argues that Nimmer’s formulation would confer joint authorship on contributors of mere ideas, *id.* §§ 5:14-16, whereas Patry’s formulation would require the contribution of “some minimal amount of expression.” *Id.* § 5:14. This Note does not purport to debate the relative merits of these positions, other than to remark in passing that Professor Patry’s stance seems more in accord with the terms of the Copyright Act. *See* 17 U.S.C. § 102(b) (2000) (denying copyright protection to “any idea”). The important point for this Note is that neither Nimmer nor Patry require the contributions of putative joint authors to be independently copyrightable. Accordingly, this position will be referred to throughout this Note by its more widely-adopted name, the “Nimmer Rule.”

86. 1 NIMMER & NIMMER, *supra* note 9, § 6.07[A][3][a].

87. As late as 2004, Professor David Nimmer himself conceded that courts had soundly rejected his proposal on this issue. David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1246 n.93 (2004).

88. *E.g.*, *Gaiman v. McFarlane*, 360 F.3d 644, 658-59 (7th Cir. 2004) (discussing both rules, and adopting the Nimmer Rule, thereby finding that the author of certain issues of a comic book was entitled to joint authorship credit in certain comic book characters, the copyright in which was held solely by the comic book’s illustrator and publisher); *Brown v. Flowers*, 297 F. Supp. 2d 846, 851-52 (M.D.N.C. 2003), *aff’d*, 196 Fed. App’x 178 (4th Cir. 2006) (citing Professor Nimmer for the proposition that a putative joint author “must make some original contribution, one which is more than *de minimis*”). It is unclear whether *Gaiman* has adopted the Nimmer Rule with regard to all copyrightable subject matter, which would require explicitly overruling prior

among the federal circuits. Accordingly, in most jurisdictions secondary contributors must prove the independently copyrightable nature of their contributions in order to win a joint authorship action, despite the fact that these contributions would be legally significant in a primary contributor's infringement action against a third party.

III. POPULAR MUSIC COMPOSITION AND PRODUCTION NORMS

The relationship between copyright doctrine and contemporary music industry practice is plagued by the fact that legal scholars, judges, and practitioners generally do not understand how music is written and recorded today. Specifically, they fail to recognize that music recording often is contemporaneous with music composition, a synchronicity that departs from the traditional notions of composition embodied in copyright jurisprudence. In the succinct words of one commentator, "[C]opyright law doesn't mesh with the practice of popular music."⁸⁹

Numerous scholars have expounded on this misconception. At least one commentator has argued that copyright law privileges Western, compositionally based means of music production over non-Western, traditional means of production, and that, in doing so, it privileges the composer over the performer.⁹⁰ Others have argued that copyright law is biased against musical idioms with improvisational foundations, such as jazz and blues, and categorically denies works in those genres sufficient protection.⁹¹ Yet another commentator has argued that copyright's focus on the Romantic Era notion of the autonomous genius composer prevents the law from appreciating "borrowing" as a historical source of artistic innovation, which creates

Seventh Circuit precedent, or whether it only applies to "mixed media" works. Compare *Gaiman*, 360 F.3d at 658-60 (adopting the Nimmer Rule in the context of contributors to comic book characters), with *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1069-71 (7th Cir. 1994) (discussing both rules, and adopting the Goldstein Rule, thereby requiring an independently copyrightable contribution for a theater company's suggestions to the playwright). See also *Brown*, 196 Fed. App'x at 188 n.5 (recognizing this uncertainty).

89. Toynbee, *supra* note 13, at 127 (discussing copyright law as a cultural and social institution in the United States and Europe).

90. See generally *id.* (arguing that copyright law is based on a set of flawed norms that do not provide adequate reward to performers).

91. See generally John R. Zoesch III, Comment, "Discontented Blues": *Jazz Arrangements and the Case for Improvements in Copyright Law*, 55 CATH. U. L. REV. 867 (2006) (regarding insufficient derivative work protection for creative jazz arrangements of original works); Note, *Jazz Has Got Copyright Law and That Ain't Good*, 118 HARV. L. REV. 1940 (2005) (making a similar argument based on the difficulty in separating the original work from the arrangement, a derivative work).

perverse results.⁹² Finally, many judicial opinions reveal an air of condescension and disdain toward American popular music in favor of Western classical music.⁹³

While a detailed discussion of these theories is outside the scope of this Note, they show that a fundamental misapprehension does exist and that it profoundly affects the substance of copyright law by creating a judicial culture that ignores the unique and valuable contributions of secondary contributors to musical works. Record producers and side musicians perform misunderstood and overlooked roles, and this allows primary contributors to benefit from broadened copyright protection without necessarily compensating secondary contributors for those gains.⁹⁴ More broadly, to the extent that the law should mirror community norms, a disconnect between copyright law and music industry practice is particularly troublesome.⁹⁵ Therefore, this Part seeks to explain the prevailing practices in contemporary popular music composition, recording, and production, including the respective roles of record producers and side musicians, with the hope of eliminating some misunderstandings about popular music composition.

A. Music Composition Today

The rise of the recording studio as a vehicle for music composition and as a mechanism for a musical work's first fixation is

92. See generally Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006) (focusing on the practice of "sampling" in hip hop).

93. See *Darrell v. Joe Morris Music Co., Inc.*, 113 F.2d 80, 80 (2d Cir. 1940) (per curiam) ("[W]hile there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear."); *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 277 (2d Cir. 1936) (Judge Learned Hand writing about popular music and opining that "[s]uccess in such music . . . is by no means a test of rarity or merit"); *Carew v. R.K.O. Radio Pictures, Inc.*, 43 F. Supp. 199, 200 (S.D. Cal. 1942) ("A phrase from Beethoven, or from any other great composer, might linger in the mind of a student of music for many years. But I do not see how the trite phrasing of an ordinary popular song, with its limitations, could linger so continuously in the mind of a person . . ."); see also Manuelian, *supra* note 65, at 127 ("Historically, courts viewed popular music with a curled lip and a suspicious eye.").

94. See full discussion *infra* Part V.

95. See Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 747 (2001) ("Copyright lawmaking must be adaptive to constant technological and social change; it must be dynamic."); Jessica Litman, *Copyright Noncompliance (Or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 238-39 (1997) (discussing the need for synergy between copyright doctrine and practical reality in order to affect compliance with the law); Nimmer, *supra* note 87, at 1275 ("The law should provide guidance as to real-world concerns, not airy, speculative, and contingent phenomena.").

the fundamental source of tension between industry practice and copyright law. In the traditional, Western archetype of music composition, a composer gives specific musical direction, generally through written sheet music,⁹⁶ to musicians who perform without significant variation from these instructions.⁹⁷ This traditional view has dominated copyright law and still influences many copyright jurists, even if only subconsciously.⁹⁸

However, over time this conventional vision of the composer has become more a theoretical notion than a practical reality, at least for popular music. The use of a written musical score largely has been replaced by a collaborative authorship process, which often occurs in the recording studio.⁹⁹ Scholars such as Jason Toynbee have recognized that this practice, which he terms “phonographic orality,” draws on the collective composition traditions of folk-music:¹⁰⁰

Another aspect of the disjuncture between phonographic orality and copyright has to do with the latter's premise that composition and performance are different functions. But in an important sense the two are intertwined in most forms of popular music making. Improvisation provides one example: a jazz or rock solo consists in composition *through* performance. Another example is the way songs are “written” by trying out ideas, or jamming, often in the studio. In neither case is there a first stage of score production, followed by a second of pure performance. In both cases recording constitutes the

96. See *infra* notes 145-68 and accompanying text (discussing the historical role of written music notation and copyright's written notation requirement).

97. Toynbee, *supra* note 13, at 124-25. In the words of Professor Arewa, this classical conception of the composer is a “common vision of musical authorship that embeds Romantic author assumptions . . . based on a vision of musical production as autonomous, independent and in some cases even reflecting genius.” Arewa, *supra* note 92, at 551; see also Toynbee, *supra* note 13, at 131 (stating that copyright law “places the individual work on a pedestal high above the historical continuum of music making”).

98. See Arewa, *supra* note 92, at 580-81 (arguing that judicial use of the terms “theft” and “stealing” rather than the more neutral term “infringement” evidenced a “disdainful, if not contemptuous, view by judges” of the non-traditional music composition practices employed in hip-hop music); Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 178 (1990) (“The way judges evaluate art inevitably affects [a] determination [of copyright infringement]; their views as to the artistic value of the works before them has an effect on how far they will be willing to go to protect the first work by suppressing the second work.”)

99. See George W. Hutchinson, *Can the Federal Courts Save Rock Music?: Why a Default Joint Authorship Rule Should Be Adopted to Protect Co-Authors Under United States Copyright Law*, 5 TUL. J. TECH. & INTELL. PROP. 77, 77-78 (2003) (discussing the collaborative nature of popular music composition, specifically within the rock genre). One theorist summarized these developments as follows:

[T]he notated score has . . . become increasingly irrelevant, an artificial mode of fixing certain elements of a song after the fact. Indeed, by the late 1960s, musicians no longer came to the studio to record a pre-existing song; the song was constructed *in* the studio, not only out of the possibilities offered by words, melody, harmony and rhythm, but also out of the sonic possibilities offered by the studio itself.

Théberge, *supra* note 17, at 143.

100. Toynbee, *supra* note 13, at 126.

moment of fixation or completion of the work, and it therefore becomes the "primary" text.¹⁰¹

These modern compositional norms are not recognized adequately by current copyright doctrine, which has a limited and inconsistent view of which aspects of the recorded composition fall within the composition's copyright.

As Toynbee intimates, even when the composition is not first composed in the recording studio, the studio often serves as the method of the composition's first fixation, making the recording the definitive guide for the boundaries of the musical work.¹⁰² Consider the following example, which no doubt occurs regularly in rehearsal spaces and garages all over the country.¹⁰³

A member of a band, perhaps the lead singer or lead guitarist, brings to a rehearsal a song that he wrote the night before and plays it for the group. He has with him a sheet of paper on which he scribbled the lyrics and the basic chord progression, and he uses this as a rough guide but sings the melody and rhythm from memory, because he did not notate those elements of the composition on paper. The group decides to learn the song, and each member constructs his own instrumental part, at times with guidance from the band member that originated the song. Some of these parts are indistinct and merely support the melody and lyrics, such as a rhythm guitar part that strums the chord progression or a drum beat that plays a standard rock groove. However, some of the instrumental parts, such as a catchy keyboard riff or a danceable bass guitar line, are unique to the song and distinguish it from similar compositions.

Once satisfied with the song, the band moves on to other business, leaving behind no written documentation of the members' respective instrumental parts. Subsequently, perhaps even after performing the song in concert many times, the band records the composition in a studio, playing it in much the same way as at the

101. *Id.* at 127.

102. *Id.*; see also 17 U.S.C. § 102(a) (2000) (providing copyright protection for musical works once "fixed in any tangible medium of expression").

103. The following example is not meant to describe any particular incident, but is merely a reconstruction of a typical informal composition and arrangement process, based on an amalgam of my years of experience as a professional musician. See also *BTE v. Bonnacaze*, 43 F. Supp. 2d. 619, 621 (E.D. La. 1999) (describing similar facts in a joint authorship suit brought by a rock band's former drummer who claimed joint authorship of musical compositions credited solely to the band's lead singer); Hutchinson, *supra* note 99, at 77 ("[R]ock music is largely a group phenomenon. A common scenario involves a band that has one member who is the primary songwriter. This primary songwriter might present a rough version of the song to the band at rehearsal, and the other band members would create their instrumental parts and arrangements.").

original rehearsal. Absent some prior fixation, that recording is the definitive fixed musical work.¹⁰⁴ It is the copy of the work in which joint authorship claimants will claim ownership and on which copyright owners will bring infringement actions.¹⁰⁵

In a recent, high-profile British case, a similar situation became the subject of a joint authorship suit involving the iconic musical composition, "A Whiter Shade of Pale" by Procol Harum.¹⁰⁶ The band's organist sued both the band's lead singer, who was credited as the sole composer of the music, and the composition's lyricist, seeking part ownership of the composition's copyright.¹⁰⁷ The court described the "working up" of the song as follows:

[Lead singer Gary] Brooker's approach to the role of the band's members . . . was that each would make his own contribution. In short, although Mr. Brooker had supplied the Song (i.e. the sung verses, using the lyrics written by [lyricist] Mr. Reid, and the chorus together with a piano accompaniment comprising chords with, as Mr. Brooker put it, "some individual notes that run between the chords"), it was up to Mr. Fisher as organist to improvise his own accompaniment. Or, as Mr. Brooker accepted, the philosophy of the band was that the different musicians each made their own musical contributions. The result was, as I accept, that the individual musicians would feed off each other in what they improvised.¹⁰⁸

Finding that "the organ solo is a distinctive and significant contribution to the overall composition and, quite obviously, the product of skill and labour on the part of the person who created it,"¹⁰⁹ the court granted the plaintiff forty percent ownership in the musical portion of the composition's copyright.¹¹⁰

104. It is assumed for purposes of this hypothetical that the limited degree of fixation found on the sheet of paper did not sufficiently describe the musical composition to meet the "fixation" requirement of the Act. See 17 U.S.C. § 102(a) (providing copyright protection for musical works once "fixed").

105. In an ideal situation, the band members would negotiate the percentage of each member's respective contribution to the composition and enter into a contract reflecting such. See *Bonnecaze*, 43 F. Supp. 2d. at 628 ("If Bonnacaze had wished to share in the fruits of Griffin's 'rough drafts,' then Bonnacaze had either to satisfy the requirements of joint authorship (which he has failed to do) or to contract with Griffin for a portion of the royalties."). However, the frequency with which this actually occurs is unclear.

106. *Fisher v. Brooker*, [2006] EWHC 3239 (Ch), No. HC05C01374, 2006 WL 3835218 (Ch. D. Dec. 20, 2006), *rev'd on other grounds*, *Brooker v. Fisher*, [2008] EWCA (Civ) 287, *available at* <http://www.bailii.org:80/ew/cases/EWCA/Civ/2008/287.html>.

107. *Id.* ¶¶ 1-12.

108. *Id.* ¶ 30.

109. *Id.* ¶ 11.

110. *Id.* ¶ 98. Brooker successfully appealed this decision; the Court of Appeals's reversal was based on equitable grounds, however, given Fisher's excessive delay in filing his suit. *Brooker*, [2008] EWCA (Civ) 287 ¶¶ 115, 141. The court left undisturbed the ruling on joint ownership of copyright, holding that the lower court judge "was entitled to find that Matthew Fisher made a creative contribution to the [w]ork and he was right to grant a declaration as to his co-authorship." *Id.* ¶ 114; see also William Patry, *A Pale Appeal*, THE PATRY COPYRIGHT

Although not binding precedent in the United States, this decision and the potential application of its reasoning to U.S. copyright law sparked controversy in the United States. Not surprisingly, traditionally credited composers and their publishing companies worried about opening floodgates of litigation from secondary contributors, while record producers and side musicians heralded the decision as a belated acknowledgement of their significance.¹¹¹ Although many observers doubt that this approach will be adopted widely in the United States,¹¹² one could argue that the British court's approach should be applied, given the ambiguity of the musical work definition under U.S. copyright law.

If nothing else, the "Whiter Shade of Pale" case provides a counterpoint to the American approach and shows that a view of musical works focused solely on the work of primary contributors is not self-evident. In contrast, *BTE v. Bonnezaze* highlights the inherent failings of American courts' typical approach.¹¹³ The court denied Bonnezaze, the former drummer of the rock band Better Than Ezra, joint authorship that Bonnezaze sought based on his participation in "working up" the band's musical compositions, where the compositions had not been fixed prior to their recording.¹¹⁴ The court based its ruling on Bonnezaze's failure to "supply the court with any evidence . . . that [he] had ever fixed those contributions into a tangible form of expression,"¹¹⁵ notwithstanding that Bonnezaze's contributions, as incorporated into the worked-up compositions, were fixed through the recording process.

In *Bonnezaze*, the court incorrectly pronounced that "[t]he sound recordings of the songs cannot serve as the tangible form required . . . to meet the independently copyrightable test required for proving joint authorship."¹¹⁶ This statement of law conflicts with the

BLOG, Apr. 4, 2008, <http://williampatry.blogspot.com/2008/04/pale-appeal.html> (discussing the appellate decision).

111. See Peter Cooper & Ryan Underwood, *U.K. Ruling Intrigues Nashville Musicians*, TENNESSEAN (Nashville), Jan. 7, 2007, at 1A (discussing positive reception of decision by some Nashville side musicians); cf. Steven Van Zandt, *Garage Rock*, BILLBOARD, Jan. 13, 2007 (contemplating the widespread ramifications for traditionally-credited composers that would result from an adoption of this doctrine in the United States).

112. Cooper & Underwood, *supra* note 111; see also William Patry, *A Whiter Shade of Joint Authorship*, THE PATRY COPYRIGHT BLOG, Dec. 21, 2006, <http://williampatry.blogspot.com/2006/12/whiter-shade-of-joint-authorship.html> (discussing the case and contrasting U.S. and U.K. joint authorship law).

113. 43 F. Supp. 2d 619 (E.D. La. 1999).

114. *Id.* at 628.

115. *Id.*

116. *Id.*

express terms of the Copyright Act.¹¹⁷ By recording the compositions, which included Bonnacaze's unique contributions, Bonnacaze and his bandmates achieved the fixation necessary to confer copyright protection.¹¹⁸ For purposes of this Note, the relevant import of this decision is what it reveals about the judiciary's view of compositional practices. The court's erroneous reasoning indicates a misunderstanding of the realities of modern music composition and an inability to synthesize those realities with copyright law. As part of this Note's attempt to resolve this misunderstanding, the following sections discuss the unique and often underappreciated roles of record producers and side musicians.

B. The Role of the Record Producer

The role of the record producer has changed dramatically since the dawn of recorded music. The earliest "producers" were often Artist & Repertoire ("A&R") executives at record labels. They were responsible for selecting compositions and organizing recording sessions during which the artist recorded live with few if any overdubs, while the sound engineer mechanically chronicled the event.¹¹⁹ However, modern technology expanded what was possible in the studio, and new models emerged.¹²⁰ As described by popular music and culture theorist Keith Negus:

During the 1950s, following the introduction of recording tape and plastic microgroove discs the opportunities arose for recording on cheaper, less cumbersome equipment. This enabled a freelance "entrepreneurial" type of producer without conventional training to record. These producers . . . were less concerned with received notions of technical correctness, and began to experiment with [sound manipulation techniques].

117. Compare *id.*, with 17 U.S.C. § 102(a) (2000) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . ." (emphasis added)).

118. One commentator summarized the significance of the court's mistake as follows:

While there is a distinction between the copyright to a song and the copyright to a recording of that song, a sound recording can serve as the fixation of a song, in order to confer copyright on it, at the same time it is a copyright-protected work in its own right. Many songwriters record their songs to fix them for copyright . . . purposes, rather than write musical notes on paper. This decision unfortunately, incorrectly and unnecessarily calls into question the legal effectiveness of that practice.

Former Drummer for "Better Than Ezra" Was Not a Joint Author of Rock Band's Songs, Because His Contributions Were Not Fixed in Tangible Form, Federal District Court Rules, 21 No. 5 ENT. L. REP. 12 (Oct. 1999); see also Hutchinson, *supra* note 99, at 91-92 (conceding that "the court applied an arguably erroneous standard"). Unfortunately, the decision in *Bonnacaze* was not appealed. *Id.* at 92 n.132.

119. MARK CUNNINGHAM, GOOD VIBRATIONS: A HISTORY OF RECORD PRODUCTION 23-46 (1998 ed.); R. SERGE DENISOFF, SOLD GOLD: THE POPULAR RECORDING INDUSTRY 152-54 (1985).

120. See generally MOOREFIELD, *supra* note 11 (discussing the effects of technology on the increasingly vital role of the record producer).

By the middle of the 1960s the studio producer had become an "artist," employing multi-track technology and stereo sound to use recording as a form of composition in itself, rather than simply as a means of documenting a performance.¹²¹

As the nature of record production evolved, any imaginary line that separated technicians from musicians disappeared.¹²² Some commentators note that the rise of the producer as an artist paralleled the industry's transition from the "single" to the "album" as the dominant format for music delivery.¹²³ Viewing the producer as an artist is the norm today, and "independent record producers," as distinguished from in-house producers employed directly by the record label, are significant power brokers and creative forces in the music industry, commanding handsome fees and royalties as a result.¹²⁴

The record producer has an enigmatic role, and the duties to be performed may vary widely between individual producers;¹²⁵ but, in short, a producer's job is to supervise and be ultimately responsible for all creative and practical aspects of the recording process.¹²⁶ Because of this supervisory role, some liken a record producer to a motion picture director, although there are also administrative aspects of the job, such as hiring personnel, licensing, and budgeting, which are more akin to the role of a motion picture producer.¹²⁷ From a creative perspective, the record producer often helps to select the compositions to be recorded,¹²⁸ chooses the backing musicians,¹²⁹ and picks the recording studio.¹³⁰

121. NEGUS, *supra* note 22, at 87-88.

122. See *id.* at 88 (regarding the emergence of musicians and songwriters/arrangers as prominent producers); MOOREFIELD, *supra* note 11, at 109-11 ("[O]ne increasingly finds cases in which the producer is the artist is the composer is the producer; and technology is what has driven the change.").

123. KRASILOVSKY & SHELME, *supra* note 21, at 33; MOOREFIELD, *supra* note 11, at 40-41. This transition required a central figure that could envision and manage the project from a broad perspective. MOOREFIELD, *supra* note 11, at 40-41.

124. See KRASILOVSKY & SHELME, *supra* note 21, at 33-41 (describing the role of the independent record producer); PASSMAN, *supra* note 2, at 116-27 (describing record producer deals).

125. See FRED GOODMAN, *THE MANSION ON THE HILL: DYLAN, YOUNG, GEFEN, SPRINGSTEIN, AND THE HEAD-ON COLLISION OF ROCK AND COMMERCE* 228 (1997) (describing a conversation between producer Jon Landau and musical artist Bruce Springsteen regarding various producers and their strengths); KRASILOVSKY & SHELME, *supra* note 21, at 33 (citing JERRY WEXLER, *RHYTHM AND BLUES: A LIFE IN AMERICAN MUSIC* 143-44 (1993), and identifying and discussing three types of producers: the "documentarian," the "servant of the project," and the "star").

126. DAN DALEY, *NASHVILLE'S UNWRITTEN RULES: INSIDE THE BUSINESS OF COUNTRY MUSIC* 40-45 (1998); NEGUS, *supra* note 22, at 82-85. See generally CUNNINGHAM, *supra* note 119 (tracing the development of the recording process in the genres of rock and pop music).

127. DALEY, *supra* note 126, at 40; PASSMAN, *supra* note 2, at 116.

128. KRASILOVSKY & SHELME, *supra* note 21, at 14.

129. DALEY, *supra* note 126, at 40.

130. NEGUS, *supra* note 22, at 84.

Most importantly for copyright purposes, the producer often arranges the compositions and is responsible for getting the right sound on tape. The arrangement process adds harmony and accompaniment to the principle melody of the composition, and it can entirely transform the character of the musical work, thus blurring the lines between arrangement and composition.¹³¹ Getting the right sound involves technical aspects of studio recording, such as microphone placement and sound alteration, some of which intersect with the related role of the sound engineer.¹³² Additionally, getting the right sound may involve coaching and directing stylistic and even substantive aspects of the musicians' and vocalists' performances.¹³³

The Copyright Act's legislative history discusses record producers' contributions as potential basis for claiming authorship in the sound recording copyright.¹³⁴ A producer must do more than merely arrange for recording sessions to qualify for authorship,¹³⁵ but the acts of "capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording" are considered sufficient for authorship.¹³⁶ However, neither the Act nor

131. Popular music scholar Antoine Hennion has noted the centrality of the arrangement process:

The song is nothing before the "arrangement," and its creation occurs not really at the moment of its composition but far more at the moment of orchestration, recording, and sound mixing. . . . The real music of the song hides behind the melody and gives it its meaning. The audience notices only the melody and thinks it is the tune itself that it likes.

Antoine Hennion, *The Production of Success: An Antimusicology of the Pop Song*, 3 POPULAR MUSIC 159 (1983), reprinted in ON RECORD: ROCK, POP, AND THE WRITTEN WORD 185, 187-88 (Simon Frith & Andrew Goodwin eds., 1990).

132. See Susan Schmidt Horning, *Engineering the Performance: Recording Engineers, Tacit Knowledge and the Art of Controlling Sound*, 34 SOC. STUD. SCI. 703, 703-05 (2004) (discussing how sound engineers and other studio personnel use microphone placement and other technical aspects of studio recording to mediate the presentation of the recorded composition). See generally Edward R. Kealy, *From Craft to Art: The Case of Sound Mixers and Popular Music*, 6 WORK & OCCUPATIONS 3 (1979), reprinted in ON RECORD, *supra* note 131, at 207 (regarding the intersection of technical expertise and art in the recording studio).

133. DALEY, *supra* note 126, at 35-36; KRASILOVSKY & SHEMEL, *supra* note 21, at 33-34; NEGUS, *supra* note 22, at 84-93.

134. H.R. REP. NO. 94-1476, at 56 (1976); see also H.R. REP. NO. 92-487 (1971); S. REP. NO. 92-72 (1971). See generally 1 NIMMER & NIMMER, *supra* note 9, § 2.10[A][2][b] (discussing record producers' originality requirement for copyright in the sound recording); 1 PATRY, *supra* note 9, § 3:161 (discussing authorship in sound recordings).

135. *Forward v. Thorogood*, 758 F. Supp. 782, 784 (D. Mass. 1991).

136. H.R. REP. NO. 94-1476, at 56; see *JCW Invs., Inc. v. Novelty, Inc.*, 289 F. Supp. 2d 1023, 1032 (N.D. Ill. 2003); *Systems XIX, Inc. v. Parker*, 30 F. Supp. 2d 1225, 1228 (N.D. Cal. 1998); see also 1 NIMMER & NIMMER, *supra* note 9, § 2.10[A][2][b] & n.38 (citing cases). This is not to suggest that apportioning authorship in the sound recording as between record producers, featured artists, and other contributors is necessarily an easy matter. *Id.* § 2.10[A][3] (discussing ownership in sound recordings).

the legislative history mention the eligibility of record producers for authorship in the musical composition copyright, aside from the situations in which they are credited explicitly as composers.¹³⁷ It seems inequitable that these artists should be excluded categorically from such authorship, considering the extensive role they play in creating the composition.

Given their broad scope of duties, producers have a holistic responsibility to deliver the completed creative product, which encompasses both musical composition and sound recording copyrights. As a result, when a song has not been previously fixed, it is easy to see how the producer may materially contribute to the creation of the musical composition even without helping to compose the musical work in the traditional, Western classical music sense. Having made such a contribution, the producer should be rewarded and treated equitably by both copyright infringement and joint authorship law.

C. Side Musicians: Sessions Musicians and Non-Credited Band Members

As noted,¹³⁸ this Note uses the term “side musician” to reference both session musicians and band members who are not considered primary contributors.¹³⁹ Session musicians are musicians who not affiliated with the featured performer as part of a musical group but are hired, generally by the producer, to perform on the recording under his direction.¹⁴⁰

The second use of the term “side musicians” refers to band members who contribute to the working up of a composition but are not credited as composers; the drummer Bonnacaze in *BTE v. Bonnacaze* is one example.¹⁴¹ Bonnacaze made contributions to the musical work in two ways. First, he played drums on the first fixation of the band’s musical compositions, which occurred through studio

137. Crediting record producers as composers is a common practice, probably more so in the pop and hip-hop music genres than in rock or country music. See DALEY, *supra* note 126, at 40-133 (1998) (discussing the role of record producers in country music); KRASHLOVSKY & SHEMEL, *supra* note 21, at 34 (regarding claims to composition copyright ownership by Sean Combs, a pop and hip-hop record producer); PASSMAN, *supra* note 2, at 121 (regarding the importance of the record producer in pop and hip-hop).

138. See *supra* notes 21-23 and accompanying text.

139. See also Jaffe, *supra* note 72, at 172-73 (discussing back-up vocalists and contributing musicians and their potential claims for authorship in the sound recording copyright).

140. DALEY, *supra* note 126, at 222-71; NEGUS, *supra* note 22, at 85.

141. 43 F. Supp. 2d 619 (E.D. La. 1999); see also discussion *supra* notes 113-18 and accompanying text.

recording, and second, he intermittently contributed “harmony, lyrics, percussion and song rhythms, melody and song and musical structure” to the band’s compositions.¹⁴² It is these kinds of contributions, as well as the contributions of record producers, that are the subject of this Note.

IV. LEGAL AMBIGUITY REGARDING WHAT IS PART OF THE MUSICAL WORK: ABSENCE OF A STATUTORY DEFINITION AND THE ELIMINATION OF A WRITTEN NOTATION REQUIREMENT

At the root of the unfair and inconsistent treatment discussed in this Note is a fundamental ambiguity regarding which musical elements are considered part of the musical work. The Copyright Act contains no definition for the term “musical work.”¹⁴³ As noted, Congress declined to define the term because Congress felt that it had a “fairly settled meaning[].”¹⁴⁴ Unfortunately, Congress’s confidence in the allegedly “settled” meaning of this term—whether sincere or a proxy for legislative inaction—was misguided. Congress failed to account for the dramatic changes that occurred as music composition moved from the autonomous composer toward today’s practices of collaborative music creation, where the recording process serves as the means of first fixation.¹⁴⁵

Congress exacerbated this uncertainty when it eliminated the 1976 Copyright Act’s requirement that musical compositions be expressed in written notation, such as on sheet music, in order to qualify for copyright protection.¹⁴⁶ Under a regime with a written notation requirement, the scope of a given musical work’s copyright is easy to determine because the musical work is comprised only of those elements notated on the score (often solely the melody and lyrics). However, now that Congress has eliminated the written notation requirement and allowed a recording to serve as the definitive “copy” of the musical work, determining which musical elements comprise the “musical work” has become more difficult.

142. *Bonnecaze*, 43 F. Supp. 2d at 621 (quoting trial documents).

143. 17 U.S.C. § 101 (2000).

144. H.R. REP. NO. 94-1476, at 53 (1976); 1 NIMMER & NIMMER, *supra* note 9, § 2.05.

145. *See supra* Part III.

146. Under the 1909 Copyright Act, musical works had to be expressed in written notation filed with the Copyright Office in order to obtain copyright protection. *See* 17 U.S.C. § 10 (1970) (repealed by the Copyright Act of 1976) (requiring the placement of copyright notice of all copies of a musical work); *id.* §§ 12-13 (requiring the deposit of copies of a musical work); *see also* full discussion *infra* notes 157-69 and accompanying text.

Musical works today are protected by copyright upon their fixation in any media of expression, be it written notation, recording, or otherwise.¹⁴⁷ But this was not always the case. Under the Statute of Anne, the world's first copyright statute, there was no protection for musical works.¹⁴⁸ Nor was there protection under the first U.S. copyright law, the Copyright Act of 1790.¹⁴⁹

Musical works were first brought within U.S. federal copyright protection in 1831.¹⁵⁰ At that time, it probably was clear to Congress what the scope of such a "musical work" copyright would be. Music composition at that time was primarily the act of one or more composers and/or lyricists putting pen to staff paper and transforming musical ideas into notes and lyrics that musicians and vocalists could read and perform.¹⁵¹ Because this era was before the creation of a sound recording copyright,¹⁵² or even the widespread commercial use of the sound recording process itself,¹⁵³ a "copy" of a musical composition could exist only as sheet music. Thus, the scope of the copyright would have followed logically: the musical work was comprised of everything written down on the sheet music and nothing more.¹⁵⁴

This concept of a musical work copyright meshed well with the advent of a federal statutory sound recording copyright, which occurred in 1971.¹⁵⁵ If the musical composition was defined by the bounds of the written notation, it was easy to listen to a piece of recorded music and distinguish which elements were protected by which copyright: the musical composition copyright covered the sonic

147. 17 U.S.C. § 102(a).

148. 1709, 8 Ann., c. 19 (Eng.); see also MOSER, *supra* note 72, at 11-13 (discussing the statute). The Statute of Anne was passed in England in 1710. *Id.* Later on, however, a 1777 decision from a case brought by Johann Sebastian Bach's son interpreted the Statute of Anne to extend protection to musical works. *Id.* at 12; *Bach v. Longman*, (1777) 98 Eng. Rep. 1274 (K.B.).

149. Ch. 15, 1 Stat. 124 (1790) (repealed by Copyright Act of 1831); see also MOSER, *supra* note 72, at 13 (describing the history of U.S. copyright law).

150. MOSER, *supra* note 72, at 14; 1 PATRY, *supra* note 9, § 3:92.

151. See generally Michael W. Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CINCINNATI L. REV. 1405 (2004) (analyzing the historical roles of written music notation and the music publishing industry in forming a property-based view of music copyright).

152. This occurred in 1971. 1 NIMMER & NIMMER, *supra* note 9, § 2.10[A].

153. The world's first recording and playback machine was invented in 1877 by Thomas Edison. CUNNINGHAM, *supra* note 119, at 23. Commercial recordings would not be available for another twelve years, and it was not until 1949, when Les Paul invented multi-track tape recording, that recorded music production as it is known today became possible. *Id.* at 24.

154. Courts have not altogether departed from this formulation. See, e.g., *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002), *aff'd on other grounds*, 388 F.3d 1189 (9th Cir. 2004) ("A musical composition captures an artist's music in written form.").

155. 1 NIMMER & NIMMER, *supra* note 9, § 2.10[A].

elements written down on the sheet music, while the sound recording copyright alone covered everything else.¹⁵⁶ The fundamental notes that were to be performed as part of the melody by the vocalist or instrumentalist, which were written down, were part of the musical composition, whereas vocal or instrumental embellishments and nuances unique to the given performance as recorded were protected only by the sound recording copyright. Yet, underlying this simple approach was a fundamental notion of copyright doctrine present in the Copyright Act of 1909, but omitted from the Copyright Act of 1976: the written notation requirement.¹⁵⁷

Under the 1909 Copyright Act, a composer had to reduce a musical work to sheet music or other written form in order to claim a copyright.¹⁵⁸ The Supreme Court adopted this requirement in *White-Smith Music Co. v. Apollo Co.*, where it held that a musical composition must be "a written or printed record . . . in intelligible notation" in order to constitute a "copy" and thus qualify for federal copyright protection.¹⁵⁹ Congress incorporated this rule into the 1909 Act, and according to its reasoning, phonograph records and magnetic tape were not regarded as "copies."¹⁶⁰ Under that regime, a putative copyright holder had to submit a "lead sheet" to the Copyright Office as a prerequisite to obtaining copyright protection in a musical work.¹⁶¹

Commentator Jason Toynbee has suggested that this scheme may have resulted from a desire to ease judicial administration.¹⁶² He argues that "[t]he two-dimensional, visual form of the musical work meant that it could become the object of a rational legal process. 'Pirate' publishers might now be challenged through the comparison of texts, original against alleged copy."¹⁶³

156. See Toynbee, *supra* note 13, at 125-26 (regarding the rise and appeal of a notation-based copyright scheme). Obviously, the sound recording copyright would also cover the performance of those aspects of the composition that were notated on the score.

157. See generally 1 NIMMER & NIMMER, *supra* note 9, § 2.05[A] (regarding the diminished significance of written notation).

158. *Id.*

159. 209 U.S. 1, 17 (1908).

160. See 17 U.S.C. § 10 (1970) (repealed by the Copyright Act of 1976) (requiring the placement of copyright notice of all copies of a musical work); *id.* §§ 12-13 (requiring the deposit of copies of a musical work); 1 NIMMER & NIMMER, *supra* note 9, § 2.05[A] & nn.9-12 (regarding the incorporation of the *White-Smith Music* holding into the 1909 Copyright Act).

161. See *Selle v. Gibb*, 567 F. Supp. 1173, 1175-77 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984) (describing both plaintiffs and defendant's processes of obtaining copyright protection in their respective musical works under the 1909 Copyright Act through the filing of lead sheets with the Copyright Office).

162. Toynbee, *supra* note 13, at 125.

163. *Id.*

Regardless of its merits, Congress consciously set aside the written notation requirement in the 1976 Copyright Act.¹⁶⁴ Specifically, “fixation” of a musical work may now be made through “any tangible medium of expression . . . from which [such work] can be perceived, reproduced, or otherwise communicated, *either directly or with the aid of a machine or device*.”¹⁶⁵ Thus, “[i]t is . . . possible to copyright a musical work merely by recording it, although the composer is unable or unwilling to reduce the work to written form in conventional musical notes.”¹⁶⁶ As discussed, this is common practice today, at least for popular music.¹⁶⁷

The elimination of the written notation requirement benefits composers, because it ensures that those who are untrained in written musical notation can still avail themselves of federal copyright protection.¹⁶⁸ However, the availability of protection for musical compositions first fixed by recording can also be problematic, because it increases the difficulty in ascertaining the musical work copyright’s boundaries.¹⁶⁹ Furthermore, it exacerbates the ambiguity caused by Congress’s failure to define “musical work” and, in doing so, contributes to copyright’s unfair and inconsistent treatment of secondary contributors.

V. INCONSISTENT TREATMENT OF MUSICAL WORKS AS BETWEEN JOINT AUTHORSHIP CLAIMS AND COPYRIGHT INFRINGEMENT CLAIMS

Copyright law’s misconception of contemporary music composition and production practices coupled with the ambiguous contours of the “musical work” copyright results in secondary contributors being prejudiced to the benefit of primary contributors. This prejudice occurs through the inconsistent nature in which courts

164. H.R. REP. NO. 94-1476, at 52 (1976).

165. 17 U.S.C. § 102(a) (2000) (emphasis added).

166. 1 NIMMER & NIMMER, *supra* note 9, § 2.05[A].

167. *See supra* Part III.A.

168. *See Former Drummer for “Better Than Ezra,” supra* note 118, at 12 (“Many songwriters record their songs to fix them for copyright . . . purposes, rather than write musical notes on paper.”); *see also* 1 PATRY, *supra* note 9, § 3:93 (“Changes in the acceptable form of fixation and liberal Copyright Office deposit regulations dramatically increased the number of musical registrations.” (citation omitted)).

169. It is painfully clear that courts are at times oblivious to Congress’s elimination of the written notation requirement when analyzing the scope of the musical work copyright. *See, e.g.*, *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002), *aff’d on other grounds*, 388 F.3d 1189 (9th Cir. 2004) (“A musical composition captures an artist’s music in written form.”); *BTE v. Bonnacaze*, 43 F. Supp. 2d 619, 628 (E.D. La. 1999) (“The sound recordings of the songs cannot serve as the tangible form required by Bonnacaze to meet the independently copyrightable test required for proving joint authorship.”).

analyze elements of a musical composition first fixed through the recording process, varying the scope of inquiry between joint authorship and copyright infringement actions. In short, courts often find the work of secondary contributors insufficient to entitle them to joint authorship in the musical work, but allow primary contributors to rely on those contributions to show probative similarity and substantial similarity in an action against third parties for infringement of the musical work. This discrepancy allows primary contributors to free ride on the contributions of secondary contributors. Thus, credited composers can more easily enforce their exclusive rights in the composition through infringement actions without necessarily having to pay secondary contributors for the full value of their contributions.

Secondary contributors presumably are paid for their contributions to the sound recording.¹⁷⁰ However, such payments probably have not accounted for the inconsistent treatment discussed in this Note, because, at least to my knowledge, this issue has not been revealed in detail previously. Accordingly, such payments would not reflect the full value of secondary contributors' contributions to the musical composition copyright.

A. Judicial Treatment of Musical Works Under Joint Authorship Claims

As discussed, under the prevailing Goldstein Rule, courts state that the contributions on which a joint authorship claim is based must be independently copyrightable for the plaintiff to prevail.¹⁷¹ However, the contributions of secondary contributors often will not be independently copyrightable.¹⁷² Accordingly, under current law secondary contributors frequently will be unsuccessful in bringing actions for joint authorship in musical compositions.

There is little precedent dealing directly with the independently copyrightable requirement for musical work copyrights;

170. See KRASILOVSKY & SHEMEL, *supra* note 21, at 57-59 (discussing payment to side musicians); PASSMAN, *supra* note 2, at 116-27 (describing compensation for record producers).

171. See *supra* Part II.C.

172. This may be because of copyright's idea-expression dichotomy, which says that copyright does not extend to any concept or idea, see 17 U.S.C. § 102(b) (2000) (stating that copyright protection does not extend to any "idea . . . [or] concept, . . . regardless of the form in which it is described, explained, illustrated, or embodied"), or because the contributions of secondary contributors do not meet the requisite showing of originality. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-46 (1991) (articulating the standard for originality). Courts' rationales in denying copyrightability are sometimes unclear and often very fact-specific, so it is difficult to parse decisions into distinct categories based on their reasoning.

however, the few relevant cases suggest judicial disinclination toward regarding the work of secondary contributors as copyrightable. For example, in *Balkin v. Wilson*, after debating the relative merits of the Goldstein Rule and the Nimmer Rule and adopting the former, the court held that a purported co-author's contributions of ideas for songs were not copyrightable and denied his joint authorship claim.¹⁷³ The court so held despite the fact that the communication of such ideas was through "precise technical specifications for how [the] songs . . . were to be written," given while the putative co-author sat with the credited composer at the piano, and notwithstanding the putative co-author's approval rights over the songs.¹⁷⁴ This court's rationale would similarly deny joint authorship to those record producers who provide musical and lyrical ideas and help shape the fixed expression of the composition.¹⁷⁵

In *Merchant v. Lymon*, the court, applying the Goldstein Rule, denied a joint authorship claim premised on the contributions of a side musician.¹⁷⁶ It upheld a jury's determination that a lengthy saxophone solo, composed and performed by a session musician in the studio and incorporated into the musical composition, was "not a substantial contribution to the song."¹⁷⁷ The *Merchant* court found that the instrumental solo was merely an "incidental musical change" and not copyrightable.¹⁷⁸

A guest vocalist in *Ulloa v. Universal Music* was denied joint authorship in the copyright of a hip-hop composition under circumstances similar to those in *Merchant*. The court so held even though the plaintiff extemporaneously created and performed a counter-melody on the recorded version of the composition, when the recording was the first fixation of the musical work.¹⁷⁹ Although the *Ulloa* court based its denial of joint authorship primarily on a determination that the putative co-authors lacked the requisite intent

173. 863 F. Supp. 523, 526-28 (W.D. Mich. 1994).

174. *Id.* at 524.

175. See *supra* notes 80-88 and accompanying text (discussing joint authorship).

176. 828 F. Supp. 1048, 1057-58 (S.D.N.Y. 1993), *rev'd on other grounds*, 92 F.3d 51 (2d Cir. 1996). Note that this claim was not brought by the side musician, but by his record label employer based on the theory that, under the "work-for-hire" doctrine, an employer is considered the "author" of works created by its employees within the scope of their employment. *Id.* at 1055; see also 17 U.S.C. § 201(b) (defining a "work made for hire"); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737-51 (1989) (discussing the requirements of the "work for hire" doctrine).

177. *Merchant*, 828 F. Supp. at 1058.

178. *Id.* (internal quotation marks omitted).

179. *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 417-18 (S.D.N.Y. 2004).

to share authorship status,¹⁸⁰ the court also refused to find that the guest vocalist's contributions were copyrightable, even after describing the standard of originality as "modest, minimal," and "a low threshold."¹⁸¹ The court's decision may have been based in part on procedural concerns, given the case's summary judgment posture, but it nevertheless indicates reluctance by courts to regard the work of secondary contributors with solicitude.

Finally, the tone of the *BTE v. Bonnecaze* decision suggests the court was skeptical that a band member's contribution of "harmony, lyrics, percussion and song rhythms, melody and song and musical structure" would entitle him to joint authorship in musical compositions recorded by the plaintiff's former band.¹⁸² The court ultimately based its decision on the plaintiff's supposed lack of fixation of his contributions to the compositions.¹⁸³ However, before doing so, the court implied that the plaintiff was an "overreaching contributor[]"¹⁸⁴ and that he had contributed merely "helpful guidance, ideas, and contributions," rather than copyrightable expression.¹⁸⁵ Given this, the court probably would not have found Bonnecaze's contributions copyrightable even absent its judgment regarding fixation.

Aside from the judicial skepticism shown in the foregoing examples, secondary contributors may face difficulty establishing the independently copyrightable nature of their contributions because of the "*scènes à faire* doctrine." This doctrine holds that copyright protection does not extend to aspects of a work that are "so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another."¹⁸⁶ In the context of musical compositions, at least one court has held that a composer's use of everyday words, phrases, and clichés was not sufficiently original to merit copyright protection.¹⁸⁷ In *Lil' Joe Wein*

180. *Id.*

181. *Id.* at 413-14.

182. 43 F. Supp. 2d 619, 625-27 (E.D. La. 1999) (discussing the independently copyrightable contribution requirement at length). For a more thorough discussion of this case, see *supra* notes 113-18 and accompanying text.

183. *Bonnecaze*, 43 F. Supp. 2d at 627-28. This Note has already criticized this erroneous rationale. See *supra* note 118.

184. *Bonnecaze*, 43 F. Supp. 2d at 623 (quoting *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991)).

185. *Id.* at 626.

186. *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004) (quoting *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003)).

187. *Damiano v. Sony Music Entm't, Inc.*, 975 F. Supp. 623, 629 (D.N.J. 1996). *But see Jarvis v. A & M Records*, 827 F. Supp. 282, 291 (D.N.J. 1993) (holding that composer's use of common

Music v. Jackson, the court held that the phrase “Go [name], it’s your birthday,” was a common “hip-hop chant” and not an original, copyrightable element of the musical composition at issue.¹⁸⁸ Furthermore, several courts have held that the harmonic chord progressions that serve as the foundation for popular musical compositions are too common to be copyrightable.¹⁸⁹

Accordingly, secondary contributors are largely unable to establish the independently copyrightable nature of their work. As a result, under the Goldstein Rule, secondary contributors cannot protect their contributions by asserting claims of joint authorship. Recent cases adopting the Nimmer Rule suggest that secondary contributors may be more likely to obtain joint authorship in the future, because the Nimmer Rule does not require each contribution to be independently copyrightable. However, in the meantime, the Goldstein Rule remains the prevailing approach.¹⁹⁰

B. Judicial Treatment of Musical Works Under Copyright Infringement Claims

The fundamental problem with joint authorship doctrine is that it coexists with infringement doctrine that allows judges and juries to consider the work of secondary contributors to help primary contributors prove infringement. Secondary contributors’ work is first introduced under either the “probative similarity” analysis of the *Arnstein* test¹⁹¹ or under the “extrinsic test” prong of the *Krofft* test.¹⁹²

phrases such as “oh,” “move,” and “free your body” created a genuine issue of fact regarding the significance to the musical work).

188. 245 F. App’x 873, 878 (11th Cir. 2007) (regarding the hit rap song “In Da Club” by Curtis James Jackson, professionally known as “50 Cent”).

189. *Johnson v. Gordon*, 409 F.3d 12, 23 (1st Cir. 2005) (citing cases and holding that “this harmonic progression, which is a stereotypical building block of musical composition, lacks originality”; see also *Tisi v. Patrick*, 97 F. Supp. 2d 539, 544 (S.D.N.Y. 2000) (finding a harmonic progression not protectable due to its commonality); *Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 282 (S.D.N.Y. 1991) (finding a certain harmonic progression unprotectable because it appears in many songs); *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (observing that harmony “is achieved according to rules which have been known for many years” and that, “[b]eing in the public domain for so long,” it cannot itself be the subject of copyright). But see *Tempo Music, Inc. v. Famous Music Corp.*, 838 F. Supp. 162, 168-69 (S.D.N.Y. 1993) (finding that in some circumstances a common harmonic progression could be expressed in a unique and thus copyrightable manner).

190. See *supra* notes 81-88 and accompanying text (discussing the Goldstein Rule and the Nimmer Rule).

191. See *supra* notes 45-57 and accompanying text. This inquiry is half of the first prong of the bifurcated test—copying as a factual matter.

192. See *supra* notes 60-64 and accompanying text. This inquiry is the first half of the “substantial similarity” inquiry, and it looks for substantial similarity of ideas. *Id.*

Under either test, dissection of the musical work by an expert is appropriate evidence.¹⁹³ This step in the infringement analysis expressly allows the consideration of non-copyrightable elements of the musical composition as probative of whether copying actually occurred or whether there is a substantial similarity of ideas, depending on which test is used.¹⁹⁴

Litigants may introduce a wide array of evidence as probative to copying, and much of it will rely on the work of secondary contributors. Such evidence may include the broadcasting of the sound recording at trial¹⁹⁵ or presentation of transcriptions of the instrumental parts performed by side musicians.¹⁹⁶ A primary contributor may even perform the composition live at trial, stylistic aspects of which may have been partially crafted by a secondary contributor at the time of fixation.¹⁹⁷ Thus, the primary contributor is able to support his infringement claim by relying on the work of secondary contributors.

For example, in *Three Boys Music Corp. v. Bolton*, the Ninth Circuit Court of Appeals affirmed a jury finding that was based explicitly on unprotectable contributions by secondary contributors.¹⁹⁸ The plaintiff introduced evidence that "the two songs shared a combination of five unprotect[a]ble elements: (1) the title hook phrase

193. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); see also *Manuelian*, *supra* note 65, at 139-44 (describing the use of expert witness testimony in a musical composition copyright infringement trial).

194. *Stillman v. Leo Burnett Co.*, 720 F. Supp. 1353, 1358 (N.D. Ill. 1989) (citations omitted); 4 *NIMMER & NIMMER*, *supra* note 9, §13.01 n.26.3.

195. See, e.g., *Selle v. Gibb*, 567 F. Supp. 1173, 1178 (D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984) (describing an infamous incident from an infringement trial where defendant Maurice Gibb of The Bee Gees, testifying as a witness, mistakenly identified a recorded composition being broadcast as his own when it was actually the plaintiff's). While the sound recordings broadcast in this trial were rerecorded as part of "comparative recordings" made by the plaintiff, it nevertheless shows the type of evidence that can be introduced to prove an infringement claim. See also Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 297 (1993) (describing a copyright infringement trial in which the judge listened to recordings of the two musical compositions at issue). The unreported trial to which the Jones article refers is *Thompson v. Richie*. See *id.* at 278 n.7 (explaining the convoluted procedural history of the litigation).

196. See, e.g., *Swirsky v. Carey*, 226 F. Supp. 2d 1224, 1227-30 (C.D. Cal. 2002), *rev'd on other grounds*, 376 F.3d 841 (9th Cir. 2004) (analyzing contrasting transcriptions of bass guitar parts as relevant to probative similarity); *ZZ Top v. Chrysler Corp.*, 54 F. Supp. 2d 983, 985-86 (W.D. Wash. 1999) (analyzing transcriptions of electric guitar riffs).

197. See, e.g., Jon Pareles, *U.S. Jury Says Jagger Did Not Steal Hit Song*, N.Y. TIMES, Apr. 27, 1988, at C22 ("In the course of the seven-day trial . . . a Juilliard faculty member played piano; a top Jamaican studio musician, Sly Dunbar, played drums, and [Mick] Jagger sang snatches of 'Jumpin' Jack Flash,' 'Brown Sugar,' and 'Miss You' from the witness stand.").

198. 212 F.3d 477, 485-86 (9th Cir. 2000).

(including the lyric, rhythm, and pitch); (2) the shifted cadence; (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade ending.”¹⁹⁹ All five elements fall under the list of possible contributions by a record producer,²⁰⁰ perhaps in conjunction with side musicians.²⁰¹ Because this prong of the infringement analysis allows for the introduction of both protectable and unprotectable musical elements, the fact that the infringement plaintiff did not contribute such elements to the musical work is immaterial.

In addition to the explicit reliance on secondary contributor contributions that occurs when a musical work is dissected in the first step of the infringement analysis, more subtle but equally invasive reliance occurs under the second step’s “lay listener test.”²⁰² Under this inquiry, the determination is not that of an expert relying on evidence of musical dissection but is the reaction of the ordinary lay listener.²⁰³ This analysis falls under either the “improper appropriation” prong of the *Arnstein* test²⁰⁴ or the “intrinsic test” portion of the *Krofft* test.²⁰⁵ Purportedly, the lay listener test reflects copyright’s foundation as a commercial doctrine; the exclusive rights provided by the Copyright Act are intended to protect the public market for an author’s work.²⁰⁶ However, the lay listener test suffers from a fundamental flaw that allows the work of secondary contributors to enter the calculus: the jury is unable to distinguish protectable from unprotectable aspects of the composition, particularly in the absence of expert witness testimony and musical dissection.²⁰⁷

199. *Id.*

200. See *supra* Part III.B. The defendants in *Three Boys Music* conceded as much, claiming that two of the five unprotectable elements were contributed by their “arranger.” *Three Boys Music*, 212 F.3d at 486.

201. This is particularly true with regard to the precise instrumental figures to be played.

202. See 4 NIMMER & NIMMER, *supra* note 9, § 13.03[E] (discussing dissection and the “audience test” in determining substantial similarity).

203. *Baxter v. MCA, Inc.*, 812 F.2d 421, 424 (9th Cir. 1987); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

204. *Arnstein*, 154 F.2d at 468, 472-73.

205. *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977). This inquiry is the second half of the “substantial similarity” inquiry, and it looks for substantial similarity of expression.

206. See *Arnstein*, 154 F.2d at 473 (“The plaintiff’s legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public’s approbation of his efforts.”); Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1452 (1997) (“Copyright is a commercial doctrine . . .”).

207. See generally 4 NIMMER & NIMMER, *supra* note 9, § 13.03[E][2] (criticizing the audience test).

In answering the infringement question, the jury is asked to disregard the elements of the musical work that are not copyrightable. In the language of the *Krofft* test, the jury is supposed to look for "similarity of expression," which is protectable under copyright, as distinguished from "similarity of ideas," which is not protectable.²⁰⁸ This rule is problematic, however, because it implies that the idea-expression dichotomy is evident to lay persons without the help of experts. It is far from clear that juries are able to parse these aspects of the musical work. Many commentators question whether juries can distinguish between copyrightable and non-copyrightable elements, even with expert guidance.²⁰⁹ To the extent that musical works have distinct identifiable components of idea and expression, this distinction can be made only on the basis of knowledge about the relative commonness or uniqueness of musical elements—a determination requiring the aid of expert witness testimony.²¹⁰ In the absence of such guiding testimony, jurors probably rely on a vast array of unprotectable material to determine substantial similarity.²¹¹ This reliance on such a wide range of evidence is concerning, because "[t]he Copyright Act is intended to protect writers from the theft of the fruits of their labor, not to protect against the general public's spontaneous and immediate impression that the fruits have been stolen."²¹² Given that much unprotectable material is the work of secondary contributors, a finding of substantial similarity necessarily will be based in part on their contributions.

208. *Krofft*, 562 F.2d at 1164; see also 17 U.S.C. § 102(b) (2000) (clarifying that copyright protection does not extend to any concept or idea).

209. Debra Presti Brent, *The Successful Musical Copyright Infringement Suit: The Impossible Dream*, 7 U. MIAMI ENT. & SPORTS L. REV. 229, 242-45 (1990); Jones, *supra* note 194, at 294-95; Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 441-43 (1988); Kim, *supra* note 65, at 118-19. Others question whether the idea-expression dichotomy has practical application to musical works at all, over and above any concerns regarding jury competence. Raphael Metzger, *Name That Tune: A Proposal for an Intrinsic Test of Musical Plagiarism*, 34 COPYRIGHT L. SYMP. (ASCAP) 139, 170 (1987); Keyt, *supra*, at 442-43.

210. See Jeffrey Cadwell, Comment, *Expert Testimony, Scènes à Faire, and Tonal Music: A (Not So) New Test for Infringement*, 46 SANTA CLARA L. REV. 137, 157-59 (2005) (advocating for the admittance of musical dissection and other expert witness testimony under the second *Arnstein* prong). Cadwell argues that "[t]he expert can . . . determine whether the similarity occurs because of infringement of another's music (infringement of expression), or whether the similarity occurs because both pieces of music have been written within the tonal system and are subject to its constraints and tendencies (merely similarity of idea)." *Id.*

211. See *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.").

212. 4 NIMMER & NIMMER, *supra* note 9, § 13.03[E][2] (internal quotation marks and emphasis omitted).

Therefore, copyright treats the scope of the musical work copyright inconsistently as between joint authorship and copyright infringement actions. By subsuming the work of secondary contributors into the work of primary contributors for copyright infringement claims, courts have broadened the scope of primary contributors' statutory monopolies without further rewarding secondary contributors. Because the work of secondary contributors is generally not independently copyrightable, secondary contributors cannot respond effectively with a joint authorship claim to establish partial ownership in the musical composition. Thus, copyright law places record producers and side musicians in an unfavorable position.

VI. PROPOSED SOLUTION: A BROAD DEFINITION OF "MUSICAL WORK" AND ADOPTION OF THE NIMMER RULE FOR JOINT AUTHORSHIP CLAIMS

As a solution to the unfair and inconsistent treatment of secondary contributors discussed above, this Note advocates the adoption of a "musical work" definition that includes all contributions by secondary contributors that are more than *de minimis* and adoption of the Nimmer Rule for joint authorship claims. This broad definition would incorporate all musical and lyrical components resulting from a non *de minimis* contribution of expression, whether the work of primary contributors (including melody and lyrics) or secondary contributors (including instrumental and vocal riffs, harmony, arrangement, and recording studio effects that had a distinguishing effect on the composition).²¹³ Such a definition could be adopted by Congress, as an amendment to the Copyright Act, or through consistent judicial interpretation. The contributions of those who help "work up" a composition, such as Bonnacaze in *BTE v. Bonnacaze*, would be included, under the rationale that such contributions are part of the composition itself.²¹⁴ This approach would eliminate the current tension between the limited "melody and lyrics" conception of musical compositions widely held by courts today and the contemporary realities of the popular music industry: collaborative composition and studio recording as first fixation.²¹⁵ Under this definition, all musical and lyrical elements evinced by a recording that

213. This definition mirrors Professor Patry's position on the "authorship" element of joint authorship; he would require a "minimal," but not necessarily independently copyrightable, contribution of expression. 2 PATRY, *supra* note 9, §§ 5:14-15; *see also supra* note 85 (contrasting Professor Patry's and Professor Nimmer's positions).

214. *BTE v. Bonnacaze*, 43 F. Supp. 2d. 619, 623 (E.D. La. 1999).

215. *See supra* Part III (discussing contemporary popular music composition and production norms).

served the first fixation of the composition would be part of that musical work, so long as such contributions were more than *de minimis*.

There are several reasons why this broad definition of "musical work" is a desirable change. As an initial matter, simply having a definition at all, regardless of its substance, is preferable to the current ambiguity. A well-defined statutory scheme that clearly delineated each contributor's rights would create a more stable and predictable business environment.²¹⁶ This definition would allow parties to bargain more efficiently with their copyright interests.

In addition to the *per se* benefits of a musical work definition, there are several specific advantages to including the musical elements contributed by record producers and side musicians within such a definition. First, the implicitly adopted "melody and lyrics" definition is archaic and no longer reflects the realities of music composition and production.²¹⁷ As discussed, the unique, definitive characteristics of a composition today often are the product of recording studio techniques and practices, including the record producer's unique musical direction.²¹⁸ Furthermore, the "melody and lyrics" vision of composition neglects to recognize the collaborative environment in which artists compose popular music.²¹⁹ Distinguishing between the contribution of the melody and/or lyrics and the contribution of an interesting guitar riff or a song's rhythmic foundation seems arbitrary when the fully realized composition emerges from a single collaborative compositional environment. A broad definition would treat all such collaborative contributors equally.

Second, a narrow definition of "musical work" does not comport with the express terms of the Copyright Act. The Act grants copyright protection to "original works of authorship fixed in any tangible medium of expression,"²²⁰ and it does not give further guidance as to the scope of a "work."²²¹ Furthermore, the 1976 Copyright Act eliminated any requirement that musical works be expressed in

216. Legal ambiguity creates uncertainty that raises the transaction costs of trying to operate within the bounds of the law. See Edmond Kelly, *Codification*, 20 AM. L. REV. 7, 9 (1886) ("[U]ncertainty makes it impossible for individuals so to conduct their life or their business as to be secure against unconscious violation of the law on the one hand, and the incurring of unknown liabilities and responsibilities on the other.").

217. See *supra* note 13 (discussing melody and lyrics cases).

218. See *supra* Part III.B-C (discussing modern recording practices, particularly with regard to the role of record producers and side musicians).

219. See *supra* Part III.A (discussing contemporary music composition).

220. 17 U.S.C. § 102(a) (2000).

221. *Id.* § 101.

written notation,²²² and musicians often obtain copyright protection by fixing musical works in the studio.²²³ Therefore, under the terms of the Act, every sonic element that comprises a sound recording should also be part of the musical composition, so long as such recording was the first fixation of that musical composition.

Accordingly, every contributor of at least minimal expression to the sound recording should be deemed a co-author of the musical composition, absent contrary agreement. Participants who only make a *de minimis* contribution should not be eligible for co-authorship. However, it is likely that many, or even most, contributions by secondary contributors would warrant co-authorship.

Critics may note that this proposal requires a partial change in joint authorship doctrine for the proposed “musical work” definition to harmonize with established copyright law. As noted, the predominant test for joint authorship, the Goldstein Rule, holds that contributions must be independently copyrightable to be the basis of a successful joint authorship claim.²²⁴ This Note’s proposed definition includes *all* contributions of expression, whether copyrightable or not. This definition would be useless if it did not also allow secondary contributors to successfully claim joint authorship. Only in making it easier for secondary contributors to claim joint authorship does this proposal eliminate the current disparity.

Thus, this Note also advocates adoption of the Nimmer Rule for joint authorship claims as a necessary outgrowth of its argument for a broad conception of musical works. As discussed, the Nimmer Rule states that contributions of putative joint authors need not be independently copyrightable so long as they are more than *de minimis* contributions.²²⁵ This rule comports with the “musical work” definition proposed herein.²²⁶ While still a minority position, the Fourth and Seventh Circuits have adopted the Nimmer rule, potentially indicating an emerging judicial trend.²²⁷ This Note welcomes and encourages such a trend, especially because, in the words of Professor Nimmer, “copyright’s goal of fostering creativity is best served . . . by

222. See *supra* notes 163-68.

223. See *supra* Part III.A.

224. See *supra* notes 80-83 and accompanying text.

225. 1 NIMMER & NIMMER, *supra* note 9, § 6.07[A][3][a].

226. It also comports with Professor Patry’s version of the Nimmer Rule. See *supra* note 85.

227. *Gaiman v. McFarlane*, 360 F.3d 644, 658-59 (7th Cir. 2004) (adopting the Nimmer Rule in the Seventh Circuit); *Brown v. Flowers*, 297 F. Supp. 2d 846, 852 (M.D.N.C. 2003) (citing Professor Nimmer for the proposition that a putative joint author “must make some original contribution, one which is more than *de minimus* [sic]”), *aff’d* 196 Fed. App’x 178 (4th Cir. 2006).

rewarding all parties who labor together to unite idea with form"²²⁸

Treating all contributors of more than *de minimis* expression to the sound recording as co-authors of the musical work may seem administratively burdensome. However, the adoption of this solution would not be as disruptive in practice as it may appear. First, a composer seeking sole ownership of the musical work copyright need only first fix the composition himself, through either written notation or solo recording. Such anticipatory recording already occurs often, such as when professional songwriters record rough "demo" recordings for use by music publishers in "pitching" compositions to recording artists.²²⁹ If a composer writes a composition alone and fixed it through either written notation or solo recording, he would have sole ownership in the composition. Any later recording of the musical work would constitute a derivative work, regardless of the contributions that others made to its arrangement or production.²³⁰

Second, ownership can be allocated easily through either *ex post* or *ex ante* contracting. All contributors to a recording that will be the first fixation of a composition can execute written copyright assignments to the party or parties who will hold the copyright, which would clearly delineate ownership.²³¹ This contract need not be an elaborate document, and even a one-page signed copyright assignment would satisfy the Copyright Act's requirements for valid transfers.²³²

To see the effectiveness of contractual allocation, consider an example from an analogous context: allocation of ownership in the sound recording. Numerous contributors to the sound recording have at least a theoretical claim to co-authorship in that copyright.²³³ Yet those contributors have resolved, at least temporarily, the uncertainties surrounding sound recording copyright ownership through contract, both among themselves and between themselves

228. 1 NIMMER & NIMMER, *supra* note 9, § 6.07[A][3][a].

229. See DALEY, *supra* note 137, at 177-83 (discussing the practice of publishers pitching songs recorded on demos).

230. Of course, the composer in this instance would have control over the creation of this derivative work. 17 U.S.C. § 106(2) (2000) (granting the copyright owner "the exclusive rights . . . to prepare derivative works based upon the copyrighted work"). As such, the composer would have the right to demand a license for the first recording of the composition, which would realistically give him at least some degree of control over the composition's arrangement and production.

231. See 17 U.S.C. § 201(d)(1) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance . . .").

232. See *id.* § 204 (specifying the requirements for a valid transfer of copyright ownership).

233. Jaffe, *supra* note 72, at 139-42. These potential authorship claimants include record producers, side musicians, and sound engineers. *Id.*

and the applicable record label.²³⁴ Likewise, all contributors to the musical composition copyright could allocate their ownership through contract. A clear definition of “musical work” that included the non *de minimis* contributions of secondary contributors would ensure that all parties could bargain with full awareness of the intellectual property rights at stake.

Third, the limitation embodied in this proposed definition—that the contribution of expression be more than *de minimis*—would filter out most spurious claims of authorship. This filtering already occurs in the context of sound recordings, as sound engineers and record producers have been denied joint authorship where their alleged contributions to the recording were insufficient,²³⁵ notwithstanding that the legislative history of the Copyright Act specifically discusses them as potential co-authors of sound recordings.²³⁶ Because the scope of the musical composition is often determined by its first fixation as a sound recording, this same reasoning would apply to filter out claims by those secondary contributors whose contributions to the composition were merely *de minimis*.

This Note argues foremost for the adoption of a broad “musical work” definition that includes all contributions of expression greater than *de minimis* and the further adoption of the Nimmer Rule. However, as a secondary position, this Note argues for a slightly less expansive “musical work” definition that would not require adoption of the Nimmer Rule. Although not the preferred solution, this approach still would improve the current state of the law, where the concept of the musical work remains undefined and ambiguous, and, as discussed above, the work of secondary contributors gets treated inconsistently and as a vehicle for unfairly broadening the scope of primary contributors’ copyrights.

234. See *id.* at 152 (regarding copyright assignments and the purported designation of musical services as “works made for hire”).

235. See, e.g., *Brown v. Flowers*, 297 F. Supp. 2d 846, 851-52 (M.D.N.C. 2003) (applying the Nimmer Rule and finding the allegation that the plaintiff “worked as a recording engineer and producer,” without elaboration, insufficient to state a claim for joint authorship), *aff’d*, 196 Fed. Appx. 178 (4th Cir. 2006); see also *Forward v. Thorogood*, 758 F. Supp. 782, 784 (D. Mass. 1991) (holding that a record collector who “arranged for the recording sessions” and selected the compositions to be recorded by the band, but who did not place microphones, engineer the recordings, or “direct the manner in which the songs were played and sung,” was not a joint author of the copyright in the sound recordings).

236. H. REP. NO. 94-1476, at 56 (1976); see also H.R. REP. NO. 92-487, at 1566-81 (1971) (extending copyright protection); S. REP. NO. 92-72, at 1566-81 (1971) (same). See generally 1 NIMMER & NIMMER, *supra* note 9, § 2.10[A][2][b] (discussing record producers’ originality requirement for copyright in the sound recording); 1 PATRY, *supra* note 9, § 3:161 (discussing authorship in sound recordings).

At a minimum, this intermediate definition should incorporate all contributions of *copyrightable* expression, i.e., all elements of the composition that are independently copyrightable. This definition would comport with even the Goldstein Rule's stringent rules for joint authorship and accordingly would not require a change in existing joint authorship doctrine.²³⁷ The Register of Copyrights has suggested a similar proposal as a test for which sound recording contributors might retain termination rights if sound recordings were deemed eligible for "work for hire" status.²³⁸ She has suggested the use of the term "key contributor," which she defined as "someone who has made a major contribution of *copyrightable* expression to a sound recording."²³⁹

Adopting this intermediate definition still would expand the ambit of protection beyond the limited "melody and lyrics" formulation implicitly used for musical works today, because it would include other independently copyrightable musical elements. Examples of copyrightable expression included under this definition, but excluded under the "melody and lyrics" definition, are distinctive vocal or instrumental riffs which, when recorded, become an integral and identifiable part of the composition.²⁴⁰ Some riffs are certainly non-copyrightable, because they are *scènes à faire* or otherwise insufficiently original to merit protection.²⁴¹ However, some other riffs are extremely original, and the definition of a musical work should reflect their significance.

It is in these instances—when the work of the secondary contributor is original enough to be independently copyrightable—that the secondary contributor has added the most value to the musical composition. A riff can become the "hook" of the composition, the part

237. See *supra* notes 81-83 and accompanying text (discussing the Goldstein Rule).

238. *Prepared Testimony of Marybeth Peters, Register of Copyrights Before the H. Judiciary Comm., Subcomm. on Courts and Intellectual Property*, 106th Cong. (2000), available at <http://www.copyright.gov/docs/regstat52500.html>, quoted in Jaffee, *supra* note 72, at 156.

239. *Id.* (emphasis added); see also Jaffee, *supra* note 72, at 158-60, 189-96 (discussing Peters's proposal and adopting it as a solution to sorting out which contributors can claim authorship in a sound recording).

240. See, e.g., *Jarvis v. A&M Records*, 827 F. Supp. 282, 289 (D.N.J. 1993) (discussing a prominent keyboard riff); *Ulloa v. Universal Music & Video Distrib. Group*, 303 F. Supp. 2d 409, 411-13 (S.D.N.Y. 2004) (discussing both an instrumental riff which "consisted of ten notes performed by a stringed instrument or synthesizer keyboard" and a distinctive vocal counter melody).

241. See *supra* notes 186-89 and accompanying text (discussing the *scènes à faire* doctrine and its application to the contributions of secondary contributors).

that draws in the listener.²⁴² Such a musical element can become associated closely with the composition as a whole and is often the aspect of the composition most easily identified by the public.²⁴³ Under the current regime, it is unclear whether the secondary contributor who created this riff (whether a record producer or a side musician) would be compensated for its full economic value, particularly if the riff is later used by a primary contributor to help prove copyright infringement. Changing the definition of "musical work" to include such a riff would allow secondary contributors to both claim joint authorship and protect their rights against third party infringers.

Nevertheless, this intermediate definition is merely a secondary proposal. Including only independently copyrightable contributions within the scope of the musical work copyright is insufficient to reward secondary contributors for the full value of their contributions. The work of secondary contributors often will not be independently copyrightable.²⁴⁴ Yet, as part of the recording, these contributions are an integral part of what makes musical compositions enjoyable for the listener.²⁴⁵ As such, they are crucial to creating the economic value of the composition.²⁴⁶ As noted by one commentator, "[i]n the case of pop music, . . . it is the record as a musical object which [is] the primary form in which the song circulates."²⁴⁷ To adequately reward secondary contributors, a "musical work" definition that includes all contributions of expression that are more than *de minimis* should be adopted, and the Nimmer Rule should be adopted more widely by courts so that secondary contributors can successfully bring joint authorship claims.

242. See Richard Middleton, *Form*, in KEY TERMS IN POPULAR MUSIC AND CULTURE, *supra* note 16, at 141, 143-53 (discussing the effect of riffs as part of the repetition that gives musical compositions their form).

243. See *id.* at 146, 150 (discussing the importance of the iconic guitar riff in the song "Satisfaction," recorded by the Rolling Stones).

244. See *supra* Part V.A (arguing that secondary contributors often have difficulty establishing the independently copyrightable nature of their contributions).

245. See MICHAEL CHANAN, REPEATED TAKES: A SHORT HISTORY OF RECORDING AND ITS EFFECTS ON MUSIC 9-12 (1995) (discussing the effects of recording on the experience of the music listener).

246. See *id.* at 12-22 (discussing the interplay of the record industry and the economic value of musical compositions).

247. *Id.* at 19.

VII. CONCLUSION

Copyright law treats the scope of the musical work copyright inconsistently. The contributions of secondary contributors are generally viewed as insufficient to garner these secondary contributors joint authorship.²⁴⁸ In that context, the contributions of secondary contributors are viewed as *outside* the scope of the musical work. Yet, simultaneously, primary contributors are allowed to rely on such contributions to prove their infringement claims against third parties.²⁴⁹ Thus, in that context the contributions of secondary contributors are viewed as *inside* the scope of the musical work. This inconsistency has allowed primary contributors to use the work of record producers and side musicians to expand the scope of their copyrights without necessarily having to pay for that broadened monopoly. As such, copyright law has treated record producers and side musicians unfairly—an unfairness which this Note hopes to both reveal and remedy.

In response, this Note urges the adoption of a “musical work” definition that includes all non *de minimis* contributions of expression, so that the work of record producers and side musicians that exceeds a minimal contribution will be deemed part of the musical work. Additionally, this Note advocates for the wider adoption of the Nimmer Rule, so that putative joint authorship claimants need not establish that their contributions are independently copyrightable for their claims to succeed. This change would make it easier for record producers and side musicians to assert their deserved ownership rights in the musical works that they help to create.

Music composition and production practices have changed dramatically since the genesis of copyright doctrine. Now, collaborative composition is the norm, and the recording studio often serves as the means of a composition’s first fixation.²⁵⁰ In the words of one music scholar, today “it is the *sound* of music that is the focal point . . . and the musical feature that consumers most readily recogni[z]e.”²⁵¹ Given the legally ambiguous nature of the “musical

248. See *supra* Part V.A (discussing the judicial treatment of musical works in joint authorship actions).

249. See *supra* Part V.B (discussing the judicial treatment of musical works in copyright infringement actions).

250. See *supra* Part III (discussing composition and recording norms).

251. Théberge, *supra* note 17, at 143.

work” concept, the distinction between this “sound” and the musical composition itself has become blurred. Considering the fundamental role record producers and side musicians play in creating this “sound,” justice demands that they be treated fairly and rewarded equitably for their artistry.

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